STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE COUNTY SUPERIOR COURT

CRAIG DUNN and PHILIP WILEY, et al.,)
Plaintiffs,)
)
-v-) CAUSE NO.
) 18D01-9305-CT-06
RJR NABISCO HOLDINGS CORPORATIONS, et al.,)
Defendants.)

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THE COURT: Be seated. Thank you. Good morning, Counsel.

(Collective good morning.)

THE COURT: All defense counsel, all defendants represented this morning?

MR. OHLEMEYER: Yes.

THE COURT: All right. Plaintiff appears in person and by counsel. Yesterday evening there was a matter for the Court to

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review, a certain videotape that I understand, Mr. Motley, you will offer during Mr. Wiley's testimony?

MR. MOTLEY: That's correct, Your Honor.

THE COURT: Is that marked, Counselor?

MR. MOTLEY: I think we've been looking for something to mark it with, some exhibit stickers. And I think somebody has gone over to our room right next door to try to find some.

THE COURT: All right. There was an objection to that, Mr. Ohlemeyer?

MR. OHLEMEYER: That's correct, Your Honor. I can articulate it if you

want.

THE COURT: Go ahead. You can state it again.

MR. OHLEMEYER: Your Honor, the wrongful death claim is a pecuniary claim. These children aren't dependent children, their relationship as children with their mother is not a matter that tends to prove any fact at issue in the case, including damages. I think under Rule 403 it would be prejudicial and inflammatory and time consuming to play that kind of videotape in this kind of case.

THE COURT: Mr. Motley, what's the purpose of the offer?

MR. OHLEMEYER: Your Honor, it certainly lays the foundation for the close-knit nature of the family, the fact they were close when they were babies and they were close makes the allegations and the testimony by the adult children today about the close-knittedness, if there is such a word as that, of the family makes that fact more likely true than untrue. And therefore, under Rule 401 it's admissible as

probative and it's relevant.

MR. CROSS: Your Honor, with regard to Mr. Ohlemeyer's Rule 403 argument, this evidence is definitely probative, and to the extent there is any prejudice, under typical Indiana practice, it is extremely unusual to consider something of this nature as prejudicial, certainly not so prejudicial as to outweigh its probative value.

MR. OHLEMEYER: If I may, Your Honor. It has to be probative of an issue in the case, and there's no issue of damages that it's probative of, and there's no issue of liability that it's probative of. These children aren't parties to the case.

THE COURT: The Court has reviewed the exhibit. I do not find the objections well taken. The exhibit will be admitted at the appropriate time.

Any other preliminary matters,

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Mr. Motley?
MR. MOTLEY: Only, Your Honor, Mr. Ohlemeyer advised me this morning, you recall, Your Honor, I agreed to winnow down the list of exhibits, that those that I most

likely thought would be coming up today. I gave him a list of 18 or 20. Last night, pursuant to an agreement he and I reached, which we'll try to do on the record every chance I can, to winnow this down so that we'll be prepared specifically for what I specifically believe will come up in a particular day. I don't know how many of them he objects to, but he advises me this morning he did have objections.
THE COURT: When would these particular exhibits be offered, Counselor?
MR. MOTLEY: Your Honor, I intended to publish five or eight of them as the first item of business this morning, to offer them to be published.
THE COURT: All right.
Mr. Ohlemeyer?
MR. OHLEMEYER: Well, if Mr. Motley would advise us which five or eight they are.
THE COURT: That's fair.
MR. OHLEMEYER: Then I'd state my objection.
MR. MOTLEY: Your Honor, the first

one that we intend to offer this morning is Exhibit 3793. That's a Nass/Motley number, Your Honor, that we worked with the defendants so we all know what we're talking about when we mention numbers. It's our database number, No. 3793.
The next -- do you want me to do them seriatim or to argue them one by one?
THE COURT: Go ahead.
MR. MOTLEY: The next is 12888.
The next is 18064; the next is 435; the next is 270. And the final one I wanted to read this morning was 1409.
THE COURT: Now, if I understand correctly, Counselor, you want to offer those into evidence this morning.
MR. MOTLEY: Yes, Your Honor, I wanted to offer them into evidence, first items of evidence, and put them to the jury, or the relevant portions, rather, some of it.
THE COURT: How long will that take, Counselor?
MR. MOTLEY: Fifteen, 20 minutes.
THE COURT: All right. Counselor,

any objection to those particular exhibits?
MR. OHLEMEYER: Yes, Your Honor, to 3793 -- let me hand you a copy of it.
THE COURT: Thank you.
MR. OHLEMEYER: This is an

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unsigned, undated document from somebody's file. It doesn't have an author, doesn't have a date, it contains hearsay upon hearsay, unattributed statements to others. It includes statements that are attributed to people that aren't attributed to anyone as a defendant in the lawsuit. The quotes aren't attributed. It's essentially a brainstorming memo by somebody about cigarettes and cigarette smoking and cigarettes and health, and I don't think there's any evidentiary foundation to establish that it's relevant to any claims in this case or admissible over a hearsay objection.

MR. SHOCKLEY: Your Honor, how do you want to handle objections from the defendants in addition to the ones that Mr. Ohlemeyer just stated that go to the admissibility of this against any party

defendant that is not shown to be its author, in other words, conspiracy issues?

THE COURT: You have an objection, Counsel?

MR. SHOCKLEY: I do. I might state at the outset, Your Honor, I think if the plaintiffs intend to offer a document against any party defendant who is not its author, that it is their burden to show to the Court initially, not mine to argue, why it isn't; but it's their burden to show that it satisfies the elements under 801(d)(2)(e).

In other words, for example, why this, they contend, is in furtherance of the conspiracy. I think it's their burden to satisfy that. As the Court will recall, they made no effort on a document-by-document basis to argue to the Court during the proper phase of this case what they would offer specifically in their belief it was in furtherance of the conspiracy they allege. And the Court was therefore not able to make that finding at the time it issued its order a week or ten

days ago. That's still ground yet to be plowed in this case; we're going to have to do that, I suggest, on a document-by-document-basis.

THE COURT: In my order of January 14th, I indicated that any objection by a defendant would be considered as an objection as to all defendants.

Now, here, if you have a specific objection, or if any other counsel has a specific objection to this particular document --

MR. SHOCKLEY: Well, is it the Court's ruling then that the plaintiffs do not have to demonstrate to the Court as a first matter why --

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THE COURT: I didn't say that, Counselor.
MR. SHOCKLEY: All right.
THE COURT: I didn't say that. Any other objection you want to state?
MR. SHOCKLEY: We object it as not being in furtherance of the conspiracy they allege, Your Honor.
THE COURT: Mr. Motley, any

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response?
MR. MOTLEY: Yes, Your Honor.
In the first place, defendants well know where this document came from. It's been adjudicated on its authenticity and its admissibility in other states. I just give that to Your Honor by background. There's no surprise here. This is a document we obtained and was certified by the University of Wisconsin library as being part of the John Hill archives. Mr. Hill was the founder of Hill and Knolton, an unindicted coconspirator in this case, who allegations about which are in the complaint.
Mr. Hill turned his papers over to these archives; they have been certified as coming from the Wisconsin archives. The document's date is 1953. The document was authored by Mr. John Hill and the document is more than -- is your rule 20 or 25 or 30 years, Judge, on age of documents? I can't remember. I think it's 30 years.
Since 1953, so it's 45 years old. It's more than 30 years; therefore, by definition it's not hearsay and by definition it's

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authenticated.
As far as its relevance is concerned, Your Honor, this is a document that I referred to in my opening statement, where Mr. Hill visited the R&D departments of all of the defendants and quoted from those defendants' visits. There's a companion document that I'm not offering right now which is actually the summary of the minutes of those meetings with the -- in December of 1953, and it has the date on it, December 15 and 16, 1953, of Mr. Hill's conversations with the R&D directors of these defendants.
With respect to its relevance, Your Honor, 801(d)(2)(e), well, it's relevant on its face, but it's also relevant under the admission of a coconspirator. We have clearly alleged that Hill & Knolton, who served as the public relations counsel to the Tobacco Industry Research Committee from 1953 to when they resigned in 1968, conducted their, what we have submitted to Your Honor in our proffer of conspiracy, Your Honor will recall there's a multitudinous amount of information about

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the Council for Tobacco Research, its

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fraudulent conduct, indeed the Journal of the American Medical Association makes -- which Your Honor denied their effort to keep out of this case, and my witnesses will rely on, will say, Your Honor, that this was the birth of the conspiracy. That this set forth the game plan of the conspiracy, which was to reassure the public to still and quiet instinctive fears and set forth the game plan about how they would do it.

THE COURT: There will be evidence as to the authorship of this, Counselor?

MR. MOTLEY: Yes, Your Honor. It's clearly, I can't -- I cannot believe they're standing up here contesting that John Hill was the author of this since this comes from Mr. Hill's personal collection which we provided the defendants a copy of. In addition to which there's an affidavit from the curator where it comes from, and the attachment to it clearly indicates that he was visiting the heads of R&D.

There are other documents, Your Honor, that I could give you that provide

additional context. There are drafts of the -- drafts of the Frank Statement that he and his colleagues prepared. And in addition to that, Your Honor, we've listed an oral history that Mr. Hill himself gave to an historian. We have a transcript and we have the oral history itself in which he sets forth that he is the one that visited -- in his own voice -- that he and his colleagues visited these heads of R&D and this is, indeed, the transcript.

I don't know that I'm required to go to Wisconsin and for every case bring the curator down here. I don't -- I haven't heard an authenticity objection from them in the State of Florida, the State of Texas. I'm surprised to hear them stand up here today and claim they don't know where this came from.

MR. OHLEMEYER: Your Honor, let me start at the beginning. My intention is to try this case. I'm not -- I don't know what happened in the State of Florida, the State of Texas. I could obviously find out, but I don't think that's the Court's intention

about what we're going to do here.

I'll tell you this: You have a document in front of you that is undated and unsigned. Regardless of how accurate Mr. Motley's testimony about where it came from and what it is, there's no witness who is going to testify that any of the quotes in there came from any of the companies that are defendants in this lawsuit.

In fact, what Mr. Motley didn't tell you is when this organization was formed in 1954, and that Frank Statement was published

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he told the jury about, there were more than six tobacco companies and cigarette companies who signed it, who were involved in it. So who is going to tell the jury that any of those statements came from any of the companies that are defendants in this lawsuit? For all we know, for all Mr. Motley knows, although he's got a lot of good arguments, it could have come from anybody that this unnamed person talked with during these conversations. I just don't think there's an evidentiary foundation to establish its relevance as an initial matter

to this case, let alone to establish it as a document that was somehow created by or in furtherance of a conspiracy. The whole idea that there are unindicted coconspirators in this case is a concept that is unknown, I think, to a single (inaudible) strict liability case. So for those reasons, I object to its admissibility.

MR. MOTLEY: Your Honor, I find that amazing because the attachment lists the people they visited, including three of his clients, heads of research and development. And for him to stand up here and tell you that he doesn't know who they visited when their names are in there kind of stretches advocacy, I would say.

MR. OHLEMEYER: They may well have talked with everybody, but every one of the statements he wants to use as evidence in this lawsuit isn't attached to anybody. There is no attribution.

THE COURT: This may become relevant. At this point it is not and the objection is sustained as to 3793 at this point. It may, however, later become

relevant through testimony, but right now I'm inclined to agree with the defense.

Any other objection, Mr. Ohlemeyer?

MR. OHLEMEYER: 1288, Your Honor, is a document written by an employee at Philip Morris to another employee at Philip Morris. It does not relate to environmental tobacco smoke or death or injury in nonsmokers, and I think it is irrelevant to the issues to be decided in this case. It was dated after Mrs. Wiley died, which I think is an important piece of information.

THE COURT: What about the time element, Mr. Motley?

MR. MOTLEY: Your Honor, it refers to an investigation he undertook February 1, 1991, if you'll look at the first word. Secondly, it goes to the pattern of conduct and state of mind of the defendants, even if it all occurred after June the 24th, 1991, when she died.

Number two, Your Honor, you've already overruled their objection that this case is

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only about environmental tobacco smoke. They made an in limine objection. This case

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is about the defective nature of cigarettes. There is no cigarette that is designed specifically for somebody to smoke in the presence of somebody else. A cigarette is a cigarette. That happened to be smoked in other people's presence.

It goes clearly to the state of mind of defendants. It demonstrates that they don't believe that a single American has ever died from smoking cigarettes, and it demonstrates the mind set of these corporations. I don't believe he's objecting to the authenticity of it. It was produced by Philip Morris from their files and stipulated to be a business record. If he objects to that, then I might have to move for sanctions on that.

THE COURT: That objection I don't find well taken. It's overruled.

Any other objection, Mr. Ohlemeyer?

MR. OHLEMEYER: Yes, Your Honor. With respect to this document, one other thing. If the conspiracy that is alleged is a conspiracy to sell cigarettes that create environmental tobacco smoke, this document

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dealing with cigarette smoke has nothing to do with that.

MR. MOTLEY: What?

THE COURT: The Court's ruling will stand.

Any other objection, Mr. Ohlemeyer?

MR. OHLEMEYER: Your Honor, document 18064 is a document that purports to be from the file of a non-party to the case. There's nothing in the document that suggests this was anything communicated to, acted upon, or relied upon by any of the other defendants.

MR. MOTLEY: Your Honor, this is -- again, this is a document produced by British American Tobacco Company, as you see on the bottom. I don't know if he redacted it, but it was produced by BATCO from their files, stipulated to be a business record in the State of Florida litigation. BATCO is wholly owned by the defendant in this case. BAT, whatever they call themselves. I call them Big BAT. I don't know exactly what they call themselves currently, but it's part of the family of companies owned by

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BAT. This issue of whether or not we had in personam jurisdiction, Your Honor, was preliminarily ruled with you, and I have to demonstrate in the course of this trial, in part, the control that was exercised by BAT, Big BAT, over BATCO and Brown & Williamson, which they also own. Your Honor, this is the first piece of evidence that I seek to

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introduce to demonstrate that relationship between BAT and BAT Holdings, or whatever they call themselves now.

In addition to that, Your Honor, it's an 801(d)(2)(e) statement of a coconspirator. I'm surprised that counsel has never heard of an unindicted conconspirator in a civil case, but the law permits that. And they are clearly listed as a party offender in the plaintiffs' complaint, beginning in the 1950s and throughout the 1990s.

This document, again, is a business record produced from BATCO's files. There was no objections by British American Tobacco Company of the defendant in the State of Florida to authenticity.

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MR. OHLEMEYER: Your Honor, very briefly, Mr. Motley knows how to sue British American Tobacco Company because he's done it. He didn't do it in this case. This document, there's no evidence that this was distributed to anyone or that it was communicated to or acted upon by anyone.

Moreover, it deals with the subject of nicotine and addiction, and let me read a sentence to you from the letter the plaintiffs' lawyers wrote us when we named an expert on addiction.

"I don't know why an addiction expert will be relevant to an ETS case." They essentially asked us to withdraw the expert, and we did. So I think the issues are irrelevant, I think it's a non-(inaudible), and I think it can't be anything that would be admissible in furtherance of any kind of conspiracy.

MR. MOTLEY: Your Honor, I know nothing about this law. You've already overruled their objections that nicotine is not relevant to this case. And if he wants to go get a nicotine expert, he ought to get

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his own CEO who testified last week that it was addictive, Philip Morris' CEO, when he testified under oath in Congress. But we don't object if wants to bring an addiction witness, to name him on late and bring him on in here. But addiction is clearly part of this case, Your Honor.

THE COURT: The argument is BATCO is not a party.

MR. MOTLEY: BATCO is wholly-owned of a defendant in this case, Big BAT. Your Honor has already looked at the issue of the acts of a coconspirator in vesting jurisdiction over a holding company. And we've got to produce evidence to that in this case. And this is the first piece of evidence we're going to introduce in this case that demonstrates the relationship between Big BAT, BATCO and Brown &

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Williamson. And we have filed, I believe -- and we have filed with your Honor factually based briefs on this issue, if you'll recall, on the in personam issue. They don't have an authenticity objection, Judge, they don't have a business record objection.

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They're objecting now because BATCO hasn't been sued. We sued Big BAT so we wouldn't have to worry about suing 20 little BATs. We'd have a bat cave full of defendants if we had to sue all of them.

MR. TRINGALI: Your Honor, if I may be heard, I represent BAT Industries. The rule, Your Honor, is BAT Industries is here. They are a defendant and they will defend as to their documents, documents in their files.

There's no dispute that this document is not from BAT Industries' files. It's in the files of British American Tobacco Company. And the rule is not that he can introduce documents from another company, even if there's a corporate relationship between the two, even if it's a parent-subsidiary relationship, there is no rule of law that allows him to introduce those documents against someone else. He knows how to cigarette British American Tobacco Company documents into evidence if he wanted to.

Number one, he could have sued them, as

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he did in many other states. That's how he has this document to begin with. Number two, he could have in the discovery process taken depositions of the British American Tobacco Company person who appears to be the author of this document and had him establish the authenticity of the document, the foundation of the document. He didn't do that.

Instead we have a situation where British American Tobacco Company is not represented about by any lawyer in this courtroom, and yet they would like to introduce their documents and say the way he does it is because they're owned by somebody else who is a defendant here. I don't think there's any support for that.

MR. MOTLEY: That's not how I view that, Judge. Just look at page 231, 232 of the Indiana Rules of Evidence. A statement, 801(d)(2)(e), non-hearsay. This is not hearsay. Even though it's a statement, it could be a statement of a boy scout. If he's a co-conspirator, it comes in against the defendant in the case if we have

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established the conspiracy.

This is a chicken and egg situation, Judge. We've got to establish the boundaries of the conspiracy, and we have

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done that in our proffer to Your Honor, and 801(d)(2)(e) clearly says, it is -- it is by definition. "The following definitions apply under this rule." "A statement," and then they go into what hearsay is not. "Statements which are not hearsay." 801(d), "Statements which are not hearsay." (2), "The statement by a party opponent." (e), "A statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

MR. TRINGALI: Your Honor, could I just say that the whole issue of conspiracy, we're forgetting a few other things before you can get to conspiracy, which is authentication and foundation. He has not done any work to get this document authenticated by the non-party, the person who is not here in this case, British American Tobacco Company.

Number two, the document, if you look

at it, is an internal document of somebody who works at British American Tobacco Company words saying nothing whatsoever about a conspiracy. So how this document comes in in furtherance of a conspiracy when it doesn't have anything to do with a conspiracy, it just talks about his own musings, is also beyond me.

Moreover he says this is his first piece of evidence showing how we control British American Tobacco Company. But if you read the document, you'll see that it has not a word about any connection whatsoever between BAT Industries and British American Tobacco Company.

But I go to the threshold issue, Your Honor, which is this is not a document from our files. It is not a document that he has any evidence that we have even seen. If he wanted to produce this document, even as a coconspirator document, he needed to get somebody from British American Tobacco Company in a deposition, if he hasn't sued them, and get them to establish what this document was, and that he did not do.

MR. MOTLEY: I would like counsel as an officer of the Court to state whether or not Mr. Greig has indeed been deposed, not in this case, but in other cases under Rule 804(b). Your Honor could consider that deposition, ask him to state as an officer of the Court whether Mr. Greig has been deposed in other cigarette litigation where BAT was a party.

MR. TRINGALI: Where British American Tobacco Company was a party, there are cases where he was deposed, but none of these other people were there, and neither was I there. Mr. Motley was there. That's the difference.

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THE COURT: Mr. Cross.
MR. CROSS: Your Honor, all of those objections are totally beside the point. As Mr. Motley correctly pointed out, this very document, and the purpose its being brought into in this case is the very fundamental reason for 801(d)(2)(e). The requirements for the admissibility of this document are clearly -- are succinctly and simply set forth in Miller on page 245, if

the Court has that. It's the proponent of a statement offered under this section, under this rule, must demonstrate only a that a conspiracy existed. That's clear. Secondly, the declarant and party against whom the statement is offered were part of the conspiracy. That's true. The statement was made in the course and in furtherance of the conspiracy.

There is case law that says that the author -- that the declarant does not need to be a party to the case presently. The party does not need to be here. Other conspirators do not need to be there. It only needed to be a statement made in furtherance of the conspiracy regardless of who was members of the conspiracy at the time.

It is a very liberal and very wide open rule in this state, and this document, as are the other documents, are clearly admissible under 801(d). Well, they are simply not hearsay, Judge. That objection is not well taken.

MR. TRINGALI: Your Honor, the

problem, once again, is they're talking about this document as something being in furtherance of a conspiracy. The problem, first of all, which they continue to ignore, is that whatever they're talking about in terms of a non-party document, first of all, the Miller thing that they're talking about applies only to in-court testimony about a non-party conspirator's' out of court statement.

Number two, Your Honor, what they have not done, though, is dealt with the fundamental issue that they haven't authenticated this document. If they had a deposition testimony of Mr. Greig, in this case, if they had done that, and had Mr. Greig authenticated the document and said this is a document I wrote, when I wrote it, why I wrote it, who I gave it to, whatever, then they could try to make this establishment that has something to do with the conspiracy.

But if you look at the document, it says nothing about in furtherance of any conspiracy. It is an internal document. It

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has nothing to do with him talking with anybody at BAT Industries or any other member of the alleged conspiracy.

And when we went through this conspiracy proffer a few weeks ago, Your Honor, they did not allege at that time that (inaudible) British American Tobacco Company. What they did was try to lump it in with BAT Industries. Your Honor, they've done -- in other cases they have sued British American Tobacco Company separately, British American Tobacco Company has had separate representation, has been able to defend itself.

Here they have not done that, nor have they done any effort during the discovery process to authenticate British American Tobacco Company documents. The document should not be admissible for those reasons, Your Honor.

MR. MOTLEY: Your Honor, may I say one last word? Judge, if you took what he said to its logical conclusion, there are 33 million documents that have been produced by the various tobacco companies. They are

on our database, there are 180,000 different names of corporate employees. If you listen to what he says, poor Mr. Wiley would have to hire every lawyer in Indiana, rent every jet in the Midwest and fly and take the deposition of 180,000 people.

Now, the Rules of Evidence don't require that. If it's produced as a business record, as this document was, and he cannot deny it, it was also admitted against BATCO in three other cases as a business record. And, Your Honor, as far as whether we have to bring a witness in here to take up day after day after day authenticating documents, Rule 104 of the Indiana Rules of Evidence don't require that.

It says specifically, Your Honor, Rule 104(a) of your Rules of Evidence say that with respect to matters relating to the admissibility of evidence shall be determined by the Court. Subject to, (b), which is relevancy conditioned on the fact when the relevancy of evidence depends upon the fulfillment of a condition of

fact, i.e., the conspiracy, Your Honor. In other words, Judge, you conditionally admit these documents, and then if you find that there is no underlying conspiracy, then the documents go out.

But in the fashion of the chicken and the egg here, we got to start with the conspiracy somewhere. And if we don't prove the conspiracy, then these documents go out. And Your Honor is not bound by the Rules of Evidence in determining conditional

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relevancy under Rules 104(a) and (b). You would never get a criminal case -- I mean, if you had to prove everything, all at the same time, how would you ever get done with a trial.

THE COURT: The Objection --

MR. OHLEMEYER: May I say two sentences, Judge?

THE COURT: Go ahead.

MR. OHLEMEYER: If you take that argument to a logical extreme, every single piece of paper in the file of the cigarette company is admissible as a statement of a coconspirator. And the law that we pointed

out do the Court on page 8 of our brief is very clear, that mere conversations or transmittals between conspirators or narrative of past events are not in furtherance of a conspiracy. A statement must serve an immediate or future conspiratorial objective and be part of an information flow between coconspirators. So for that reason I think just because it was in somebody's file and just because they've alleged a conspiracy and just because it's a hard conspiracy for them to prove doesn't make it admissible.

THE COURT: Objection to 10864, objection is overruled. Its conditional, however, and subject to a motion to strike, as Mr. Motley pointed out.

Any other objections?

MR. OHLEMEYER: 435, Your Honor, is a memo by the general counsel of Brown & Williamson. It is pure attorney work product. It's a document for which privilege has been claimed. It's a document for which plaintiffs tried to deprivilege as part of the pretrial proceedings. It deals

with addiction, which has nothing to do with environmental tobacco smoke. And again, it's not any statement in furtherance of any conspiracy or part of the information flow between any co-conspirators, so I object.

THE COURT: Privilege?

MR. MOTLEY: They claim this one is privileged. This is a document that's been deprivileged now six times by various courts either because it's in the public domain, it's in the congressional record, Your Honor, or it's part of a crime fraud.

Your Honor said you would defer these privilege issues. We don't believe we even need to get to privilege here. This document, Your Honor, is in the record congressional record of the United States. It's in the Food and Drug Administration. Their findings of fact that are published are based on this document. Four courts have said that it's in the public domain. If it's in the public domain, it's not

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privileged.
The court in California found it in the public domain, the court in Texas found it

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in the public domain, the court in Mississippi found it in the public domain. And it's been found crime fraud in the State of Florida; therefore, in the public domain. In the State of Minnesota it was found crime fraud.
Nobody that's looked at this document, Your Honor, can say it's privileged. It's been out now, it's been -- it's on the Internet. You would have the hypocritical situation here, Your Honor, that every man in America, if he wants to read this document, other than these nine jurors, would be able to turn on the Internet and read this document. It's been in the public domain, it's been cited in books, it's been cited -- this one document has been quoted in the New York Times, it's been quoted in USA Today.
This is the reason these courts have held that it's not privileged because it's in the public domain. How in the world can the Congress of the United States put it in the congressional record and the Food and Drug Administration cite it and attach it to

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their findings of fact two years ago and then continue to claim its privileged?
MR. OHLEMEYER: I'll tell you why, Your Honor. They have different rules than we do. If Mr. Motley wanted to do something with this document during discovery, he should have filed a motion to have the claim of privilege removed and had you adjudicated it; we could have briefed it, we could have let you know whether everything he just told you was fact or whether it's accurate, but this isn't the time to do it.
It's privileged document, it's attorney work product that deals with issues that are not relevant to the case.
MR. MOTLEY: We filed such a motion and Your Honor said you would take them up on a, if I recall correctly, on a case-by-case basis.
MR. OHLEMEYER: I think Your Honor denied that motion.
MR. MOTLEY: You denied that before the trial started.
THE COURT: The objection to 435 is overruled. Any other objection?

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MR. MOTLEY: That's all we'll try to raise this morning in the interest of time.
THE COURT: We'll save 270 and 1409 for a later time.
MR. OHLEMEYER: Your Honor, can I ask one question? I don't mean to belabor

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this. You admitted the one document conditionally. Does that allow him to publish it?

MR. MOTLEY: If it's admitted, it's admitted, Judge.

THE COURT: Exactly. Now, the jury may be directed to disregard that.

MR. OHLEMEYER: I think that's -- under Rule 403, that would be discretion to prohibit him from publishing it on the theory that it's extremely inflammatory and prejudicial, and it's hard to tell them to disregard something that they've already heard this early in the case.

MR. MOTLEY: Your Honor, that's the reason for the conditional rule. If the plaintiff wanted or the state, if it's the prosecution doesn't get it in, we're going

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to suffer the consequences. Big time suffer the consequences.

THE COURT: Mr. Reynolds.

MR. REYNOLDS: Your Honor, it would be my view, if this document goes in conditionally and the jury reads it, as we believe Your Honor would have to withdraw it at a later time, there's no way an instruction from the Court is going to remove the prejudice from those documents. You've read it; you know what it says. My judgment is it clearly will result in a motion for mistrial, which in my judgment is what the Court would want to grant in (inaudible).

THE COURT: All right. Thank you, Counselor.

MR. MOTLEY: Your Honor, how do we proceed? Do we hand these to the clerk to be marked or how do we do that?

THE COURT: The bailiff has evidence -- evidence stickers.

Objection was sustained to 3793. 12888, objection was overruled. 18064 was overruled and 435 overruled. So you should

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have three documents to mark.

MR. MOTLEY: Thank you.

MR. OHLEMEYER: Your Honor, may I retrieve my copies?

THE COURT: Certainly.

When the jury comes in, you can offer those, Counselor.

MR. MOTLEY: May I publish them and show them on the screen at the same time?

THE COURT: Yes.

MR. MOTLEY: Thank you.

MR. TRINGALI: Your Honor, may I just ask one request. Maybe Mr. Motley would agree with this, which is when he reads in the document, the British American Tobacco Company document, since they are not here and there is no witness from that company, that he identifies it as a British

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American Tobacco Company.
MR. MOTLEY: Glad to do that.
THE COURT: Thank you.
MR. CASSELL: All rise.
(Jury present)
THE COURT: Be seated. Good morning, ladies and gentlemen. I apologize

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for the delay. There were some matters that I had to attend to out of your presence. That will happen from time to time, but we will make every effort to prevent that as much as we can. But I apologize.
As you know, ladies and gentlemen, I've read the preliminary instructions. The attorneys have had an opportunity to make their opening statements as a preview of what the attorneys feel that the evidence will be. We are now ready to begin receiving evidence.
Mr. Motley, you may commence.
MR. MOTLEY: May it please the Court, good morning, ladies and gentlemen of the jury. We're going to publish or read to you and simultaneously show it to you on the screen three documents that the Court has admitted into evidence. Your Honor, these are 12888, first; 18064, second; and 435, third.
THE COURT: All right. On motion of plaintiff, the Court now admits 12888, 18064, and 435 into evidence in this matter.
(Plaintiffs' Exhibit(s) 12888, 18064,

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435 received in evidence.)
MR. MOTLEY: Ladies and gentlemen of the jury, the first document which you should see on the screen here momentarily is a Philip Morris of America document. 12888.
MR. OHLEMEYER: Your Honor, I object to the commentary on the documents. It's identified, he can publish it, but I don't think he should describe it or narrate or fill in the blanks.
MR. MOTLEY: It says on the letterhead Philip Morris of America.
MR. OHLEMEYER: He can read that.
THE COURT: You can read that. I don't want any outside comments. Just tell the jury what the document is.
MR. MOTLEY: It says Philip Morris U.S.A. Just keep it off the screen. I'll read it. This is from Mr. Myron Johnson, to Mr. Jack Nelson, dated August 12, 1991, on Philip Morris, U.S.A., Interoffice Correspondence, Richmond, Virginia.
It says in part: The February 1, 1991 issue of Morbidity and Morality (sic) Weekly Report --

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MR. OHLEMEYER: Excuse me, your Honor. It's mortality, M-O-R-T.
MR. MOTLEY: Issue of Morbidity and

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Mortality Weekly Report. It's not the first page. They can't see it anyway. Just take it off the screen.

Start over.

"The February 1, 1991 issue of Morbidity and Mortality Weekly Report (MMWR) reported that the Centers for Disease Control (CDC) has estimated that in 1988 there were 434,175 deaths caused by smoking." Smoking. "They even have an acronym for deaths they claim were caused by smoking, (SAM, for smoking-attributable mortality), and a special software package to make the calculations (SAMMEC II for Smoking-Attributable Mortality, Morbidity and Economic Cost). Since 434,175 deaths works out to almost exactly 20 percent of all deaths, it should not be difficult to find some of those bodies, so I went hunting for them.

"The best place to start the search is Utah, not because there should be a lot of

them there, but because there should be fewer of them in Utah than anywhere else. Utah is 80 percent Mormon, and Mormons are supposed to abstain from alcohol, tobacco, caffeine, and pre-marital sex. I have no data on caffeine or pre-marital sex, but many people in Utah do abstain from alcohol and tobacco: Per capita consumption of both cigarettes and beer in Utah have consistently been about 45 percent lower than the national average. Thus, if smoking causes 20 percent of all deaths, the age-specific mortality rates in Utah should be about nine percent lower pre-marital average."

And, Your Honor, I elect to skip over to page 3, with the Court's permission. The jury will have the entire document.

THE COURT: All right.

MR. MOTLEY: On page 3, it says, "Premature Deaths.

"Another way of looking at the data is in terms of premature death. Since the average life expectancy in the United States is about 75 years", of age, "a premature

death is generally considered to be one that occurs before that age. For reasons known but to them, however, the CDC in this case chose 65, so I chose to play the game their way."

Electing over to page 5. "Regional Differences in Cause of Death."

"Actually, I don't much care what people die of. Everybody dies sooner or later, even nonsmokers, although the Health Theologians would have us believe otherwise. I have the data, if anyone is interested, but I'm not sure to what extent it could be trusted. Nationally, in 1987 (the latest

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year for which I have this information) only 11.9 percent of deaths were confirmed by autopsy, including only 4.5 percent of deaths attributed to malignancies, 7.6 percent of those attributed to cardiovascular disease, and 5.7 percent of those attributed to chronic obstructive pulmonary diseases. In addition, much has been written about the failure of autopsies to confirm the cause of death as reported by the attending physician, as well as about

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failure to report accurately when there are multiple causes of death. By considering all-cause mortality, this problem is easily avoided. The body in question is either dead or alive."

Page 6. "I couldn't find a single --"

MR. OHLEMEYER: Excuse me, Your Honor, I'd like under Rule 106 for Mr. Motley to read the paragraph that precedes it.

MR. MOTLEY: I'm glad to do that, Judge.

THE COURT: Go ahead.

MR. MOTLEY: "When looked at in terms of all-cause mortality, and whether measured in terms of age-specific mortality rates, premature mortality, or years of potential life lost, it is clear that the people in smoke-free Utah are at greater risk of premature death than are the people in Minnesota, where per capita cigarette consumption is 60 percent higher than in Utah and fairly close to the national average.

"I couldn't find a single one of those

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430,175 bodies."

And then the document, Your Honor, is initialed and it shows a copy to one, two, three, four, five, six, seven, eight, nine, ten people, and then to the central file.

The second document, ladies and gentlemen of the jury, is a document produced by a company called BATCO. And it's entitled, "Structured Creativity Group Thoughts by C.C. Greig, Research and Development, Southhampton, Marketing Scenario."

"Before starting on any future scenario, let us look at what we are currently selling and where and how it has developed.

"A cigarette as a drug administration system for public use --"

MR. OHLEMEYER: Excuse me. I don't mean to interrupt, but I think you need to read the quotes the way it was written.

MR. MOTLEY: "A cigarette as a 'drug' administration system for public use has very significant advantages.

No. 1, "Speed. Within 10 seconds of

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starting to smoke, nicotine is available in the brain. Before this, impact is available giving an instantaneous catch or hit, signifying to the user that the cigarette is 'active'. Flavor, also, is immediately perceivable to add to the sensation.

"Other 'drugs' such as marijuana, amphetamines, and alcohol are slower and may be mood dependent."

No. 2, "Low Dosage. The delivery of nicotine from the puff of a Unit Kingdom middle tar (United States full flavor) is about 0.1 milligrams or 100 ug," whatever that is, "of the active agent. By contrast, other common drugs," and drugs there is not in quotations, "such as aspirin require about 300 milligrams (3000 fold excess on one puff, 300 fold excess on a per cigarette comparison), and a saccharin tablet contains about 15 milligrams of active agent.

"Other extremes of drug dosages are alcohol (1 'shot' of about 1 oz, = ends 28 grams, at approximately 40 percent alcohol is about 10 grams or 10,000 milligrams, an excess of 100,000 fold per puff or 10,000

fold per cigarette), and LSD, where a dose of 100-500 ug," whatever that is," "lasts" -- that's my comment, Judge, because I don't know what a ug is -- "lasts 12-24 hours but is viewed as askance by most legal authorities. The contraceptive pill another all-day active (hopefully) drug, has 1 to 1/5 milligram of active ingredients.

"Thus nicotine is about the lowest dose 'common' drug not available!

The unit cost of a 10 minute 'high' from tobacco is, in UK terms, about 6 pence (approximately 9.5 US cents)" or pennies. "although much lower elsewhere. This sum is about 40 seconds per pre tax earnings at the United Kingdom average wage or about 1 minute after tax!

"The future? Thus we have an emerging picture of a fast, highly pharmacologically effective and cheap 'drug', tobacco, which also confers flavor and manual and oral satisfaction to the user. There are other things about tobacco though. It is legal (as is alcohol but not marijuana and LSD), and the articles themselves are eminently

portable. It can be used freely in public places in most countries.

"So, all and all, it is a relatively cheap and efficient delivery system, legal and easily usable.

"However, it has drawbacks. The major one is that it has a 'health shadow' over it which is not easy to dispel. Secondly, it is a messy habit, polluting the non-smokers' breathable atmosphere, and leaving ash and

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debris, not to mention smells, around for hours or days. Thirdly, carelessly used, it sets fire to things.

"As a result of all these, it now has a social acceptability much below that of former times."

Your Honor, I propose to skip over to page 4 of the document. This is about a 10-page document, 12-page document.

THE COURT: All right.

MR. MOTLEY: Page 5.

"Now, there are many confounding factors involved - and I invite you to take your pick as to which you think most important, but I surmise that over a

smoker's lifetime involvement with cigarettes in general, he tends to intimately, 'titrate' or adjust his current delivery towards that with which he was first acquainted - if the cigarette will let him."

Page 5.

"Where do we go from here? One obvious route is to give people more nicotine as tar is reduced, i.e., increase the nicotine:tar ratio; or as we normally use terms, decrease the tar:nicotine ratio. But could we?

"Technically, the answer is yes, but all our experiences founder on the rock of acceptability. The very reason is that since tobacco is a relatively efficient nicotine delivery system, over what is now some hundreds of years, a balance in subjective flavor: strength ratios has been struck."

And then over to page 10.

"Summary. So - give them what they seem to want taste and value. And always remember that, while King James I issued his famous Counterblaste to Tobacco, in 1604, it

is nicer from our point of view to remember Oscar Wilde's words in "The Picture of Dorian Gray' in 1981:

"'A cigarette is the perfect type of a perfect pleasure.

"'It is exquisite, and it leaves one unsatisfied. What more can one want.'"

Let us provide the exquisiteness, and hope that they, our consumers, continue to remain unsatisfied. All we would want then is a larger bag to carry to the bank."

The next document, ladies and gentlemen, is No. 435, and the date of this is July 17, 1963. It's a Brown & Williamson document. "Implications of Battelle Hippo I & II and The Griffith Filter."

"The determination by Battelle of the tranquilizing' function of nicotine, as received by the human system in the delivered smoke of cigarettes, together with nicotine's possible effect on obesity,

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delivers to the industry what well may be its first effective instrument of propaganda counter to that of the American Cancer Society, et al., damning cigarettes as

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having a causal relationship to cancer of the lung. The Battelle work is not in any degree responsive to that indictment nor to the Report expected to be returned by the Surgeon General's Committee on Smoking and Health. I would submit, however, that the Griffith filter offers the bridge over which the industry might pass from its present terrain of defense to a field for effective counter attack using the Battelle study as the basic weapon. I will assume for purposes of this note that the 'Griffith filter' is one which permits filtration to specifications; it filters selectively, both qualitatively and quantitatively. It can deliver taste and nicotine (and nicotine in even more effective form) free of constituent #1 to infinity, selectively. I grossly overstate and oversimplify Dr. Griffith's claims deliberately.

"The problem is simple, if the answers are complex. Assume the Surgeon General's Committee concludes (whatever the jargon of scientific analysis and to whatever degree specific) that there is real and compelling

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evidence of a causal - or even a strongly 'predisposing' relation between smoking and cancer. Cardiovascular disorders will, in all probability, also be found related to smoking. Upon that event, it would seem clear to me the industry must do two things.

"Whatever qualifications we may assert to minimize the impact of the Report, we must face the fact that a responsible and qualified group of previously non-committed scientists and medical authorities have spoken. One would suppose we would not repeat Dr. Little's oft reiterated 'not proven'. One would hope the industry would act affirmatively and not merely react defensively. We must, I think, recognize that in defense of the industry and in preservation of its present earnings position, we must either, (a), disprove the theory of causal relationship, or (b), discover the carcinogen or carcinogens, co-carcinogens, or whatever, and demonstrate our ability to remove or neutralize them. This means that we must embark - in whatever form of organization - on massive and

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impressively financed research into the etiology of cancer as it relates to the use of tobacco; what constituents or combination of constituents in cigarette smoke cause or are conducive to cancer of the lung. Certainly one would hope to prove there is

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no etiological factor in smoke, but the odds are greatly against success in that effort. At the best, the probabilities are that some combination of constituents of smoke will be found conducive to the onset of cancer or to create an environment in which cancer is more likely to occur."

Page 2. "The TIRC" Tobacco Industry Research Committee, "cannot, in my opinion, provide the vehicle for such research. It was conceived as a public relations gesture and (however undefiled the Scientific Advisory Board and its grants may be) it has functioned as a public relations operation. Moreover, its organization, certainly in its present form, does not allow the breadth of research - cancer, emphysema, cardiovascular disorders, et cetera - essential to the protection of the tobacco industry. I

suggest that for the new research effort we enlist the cooperation of the Surgeon General, the Public Health Service, the American Cancer Society, the American Heart Association, American Medical Association, and any and all other responsible health agencies or medical or scientific associations concerned with the question of tobacco and health. The new effort should be conducted by a new organization lavishly financed, autonomous, self-perpetuating, and uncontrolled, save that its efforts be confined to the single problem of the relation of tobacco to human health.

"Thus, to accept its responsibility would, I suggest, free the industry to take a much more aggressive posture to meet attack. It would in particular free the industry to attack the Surgeon General's Report itself by pointing out its gaps and omissions, its reliance on statistics, its lack of clinical evidence, et cetera, et cetera. True we might worsen our situation in litigation, but that I would risk in contemplation of the greater benefits to be

derived from going on the offensive. My record of advice in this area may well justify the charge of inconsistency, but let me say that so long as the industry does not assume its research responsibility, my long-held position would remain unchanged and I would oppose either outright attacks on the Surgeon General's Report or the giving of assurance to the smoking public not supported by research evidence.

"There is, however, the problem of what to do until the doctor comes. And this leads me to the second of the two measures I would urge the industry to take:

No. 2, "The Surgeon General's Report will, of course, set off attacks all along the line. Our harsher critics - Senators

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Moss and Newberger, the American Cancer Society, et al. - will immediately press for all sorts of restrictive and repressive programs:

"A) Public education directed particularly at the young.

"B) Much harsher Federal Trade Commission rules in respect of cigarette

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advertising, with restrictions of the scope and control of content thereof. One might anticipate rules seeking to prevent the use of 'glamour situations', endorsements including those of athletes, prominent entertainment figures, et cetera, and quite likely an effort to bar tobacco advertising from television and radio.

"C) 'Content', labeling or cautionary legends.

"D) FTC to be given power of preliminary injunction in respect of cigarette advertising.

"E) Repressive taxation."

Page 3: "To meet these threats, which will arise not merely at the federal but at the state level as well, the Tobacco Institute is available but it can be effective only if the industry abandons its timorous approach to the institute as a functioning trade association. It should be noted that current activities in the Institute indicate, indeed, that that attitude is beginning to change and it is to be hoped that our present dangers may

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further that progress.

"Even to outline the possible defensive and offensive programs the Institute might engage in to meet the dangers I have prophesied is far beyond the scope of this note. I must confess that I have heretofore rather opposed the idea of attempting to make forward plans before the Surgeon General's Report is issued, but I am beginning to believe that perhaps a session of company presidents to consider the possibilities of such preplanning might be desirable.

"To accomplish anything effective, the institute needs the leadership of a strong tobacco figure, e.g., Albert Clay, Paul Hahn, et cetera, a highly expert trade association staff, including experienced and respected lobbyists and, lastly, such adornments of public figures as appearance and occasion warrant.

The question immediately rises: How would such aggressive posture affect litigation? With one exception (Green v. American Tobacco Company), those actions

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which have gone to judgment were won by the defendants on the defense of assumption of

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risk. The issuance of the Surgeon General's Report will, in my opinion, ensure the success of that defense as to causes of actions arising in the future if the industry can steel itself to issuing a warning. I have no wish to be tarred and feathered, but I would suggest the industry might serve itself on several fronts if it voluntarily adopted a package legend such as, 'Excessive use of this product may be injurious to the health of susceptible persons' and would embody such a legend in pica in its print advertising. This is so controversial a suggestion - indeed shocking - that I would rather not try to anticipate the arguments against it in this note but reserve my defense.

"It is difficult to assess the effect of the Report on causes of auction arising prior to its issuance. Logically, it would be argued, the Report does not no more than collate preexisting knowledge, knowledge that is available to the buyer as the

seller. But logic might - in the minds of a jury - yield to the emotional reaction that if this knowledge was available to the seller it was up to him, having the means to do so to make the product safe. A jury might, whether instructed or not, operate on the theory of comparative negligence: 'True the buyer was negligent in smoking a product he knew was dangerous, but he was lulled by the seller and the seller's negligence was the greater in failing to make his product safe.

"All one can say is that the report will in all probability greatly complicate the litigation problem.

"Now at long last I come back to the Battelle report and the Griffith Filter. If Dr. Griffith is no more than on the trail of effective controlled filtration, we should conduct our planning on the assumption of success."

Next page. Just one and a half pages more.

"Battelle says: 'The reasons for the pleasure of smoking,' it's in quotes, 'must

be found partly in the relief of anxiety that cigarette smoking brings so constantly, and in such a very short time.

"'This sedative - or soothing - effect of cigarette smoking and of nicotine is however very different from the tranquilizing effect as it was defined by pharmacologists after the discovery of the Rauwolfia alkaloids. Tranquilizers are highly effective in the management of overactive psychotic patients and, as such, are largely used in psychiatry; nicotine is certainly devoid of such effects.

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"'Our investigation definitely shows that both kinds of drugs (Rauwolfia alkaloids and nicotine) act quite differently, and that nicotine may be considered (its cardiovascular effects not being contemplated here) as more beneficial - or less noxious - than the new tranquilizers, from some very important points of view.

"'The so-called beneficial effects of nicotine are of two kinds:

No. 1. "'Enhancing effect on the

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pituitary - adrenal response to stress.

No. 2. "'Regulation of body weight.

"'These effects do not seem to be shared by reserpine, which on the contrary shows undesirable side-actions that are not given by nicotine, i.e., a nearly complete blockade of gonadic and thyroid activities, reflecting most probably a general blockade of the hypothalamo-pituitary system, which normally controls all the endocrine activities.'

"Moreover, nicotine is addictive.

"We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms. But cigarettes - we will assume the Surgeon General's Committee to say - despite the beneficient effect of nicotine, have certain unattractive side effects:

"1) They cause, or predispose to, lung cancer.

"2) They contribute to certain cardiovascular disorders.

"3) They may well be truly causative in emphysema, et cetera, et cetera.

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"We challenge those charges and we have assumed our obligation to determine their truth or falsity by creating the new Tobacco Research Foundation. In the meantime (we say) here is our triple, or quadruple or quintuple filter, capable of removing whatever constituent of smoke that is currently suspect, while delivering full flavor - and incidentally - a nice jolt of nicotine. And if we are the first to be able to make and sustain that claim, what price Kent?

"Dare we as a matter of policy make such claims? If they are true, and if we make no claim of freedom from danger - indeed, if we cry caution - why should we not? I would submit that the Federal Trade Commission in the face of (1) the industry's research effort, (2) the truth of our claims, and (3) the 'public interest' in our filter, cannot successfully deny us the right to inform the public.

"As for litigation, it would be my opinion that we would not put ourselves in

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substantially worsened position and in any

event a successful Avalon could be expected to satisfy a number of judgments for damages.

"Have we an obligation to make our knowledge available to our competitors? If the Griffith claims stand up and when we have perfected the Griffith filter and stocked the necessary machinery, et cetera, then I suggest there is strong moral obligation on us to make our knowledge public and free. And think of the kudos. I will be vastly surprised if such disclosure markedly adds to our competitors' knowledge but that is beside the point.

"The point is: On this new terrain, permitting strong offensive action, we get there fustest with the mostest."

That's the end of the documents we seek to publish this morning, Your Honor.

THE COURT: Thank you, Mr. Motley.

Mr. Motley, would you call your first witness.

MR. MOTLEY: Your Honor, the plaintiff calls Philip Wiley.

THE COURT: Have a seat right over

there. Would you tell the jury your name.

THE WITNESS: My name is Philip Wiley.

THE COURT: Would you spell your last name.

THE WITNESS: W-I-L-E-Y.

THE COURT: Thank you.

MR. MOTLEY: May I proceed, Your Honor?

THE COURT: Go ahead, Counselor.

PLAINTIFFS' WITNESS, PHILIP WILEY, SWORN

DIRECT EXAMINATION

BY MR. MOTLEY:

Q Mr. Wiley, I'm over here, but the jurors are over here, so if you'd kind of aim your answers to them so they can look at you, your whole body and your appearance when you speak, okay?

A Yes.

Q Are you a little bit nervous?

A I have a few butterflies this morning.

Q Your Honor, is he being broadcast?

(Discussion off the record).

Q How old a man are you, Mr. Wiley?

A Sixty-five years.

Q And where do you currently reside?

A [DELETED]

Q And how long have you lived in the South?

A Five and a half years.

Q You moved there when?

A One year after my wife passed away.

Q That was in June of 1991?

A That's right.

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Q Where did you grow up?
A In Delaware County, Indiana.
Q Any particular part?
A Around the Riggins Dairy. I was raised on the farm. My father was a farmer there for a number of years. Then we moved on to Blackford County. And I lived on the farm there for a number of years.
Q Sir, did you spend your adult professional life as an ordained minister with the Wesleyan church?
A Yes. In 19, around 1957, I was ordained into the Wesleyan church as a minister.
Q Now, you understand the significance of the oath to tell the truth you took here today.
A Yes, I do.
Q Your late wife was Mildred Wiley?

A Yes.
Q Would you tell us, please, how you met Mildred Wiley.
A I met Mildred Oden in Frankfort, Indiana, she came to high school there. She was a senior and she was an attractive young lady. She took my eye. And we started dating. She graduated from high school, she went on to nurse's training at Home Hospital in Lafayette School of Nursing. I continued at Frankfort five years. I took four years of college and I took an extra year for a THB.
Q What's that?
A Theological training.
Q And how long did you date Mildred?
A When she went off to nurse's training, in 19- -- I believe it was 50 -- I'm not too good at the years, but when she went off to nurse's training --
Q If I tell you that there will be testimony she graduated in 1955, would that --
A Fifty-five, would be in '52, no doubt, that she went to nurse's training, and I proposed to her at that time. And we were engaged for those three years. The last three years

of her nurse's training we were allowed to get married. And then I moved to Lafayette, Indiana, and spent three months there before moving on to the state of Oregon.
Q What did you do in Lafayette, Indiana?
A I worked at National Home Corporation. The builder of prefab homes.
Q And why did you move to Oregon?
A We went out to Oregon, I was required by the church to have five years as a minister before going over as a missionary, so we moved. It was suggested that we take a church in a little community of Svenson, Oregon.
Q Where about is that?
A It's near the Columbia River, 12 miles from the Pacific Ocean.

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Q And you were serving as a minister at a small church there?
A That's right.
Q What did your wife Mildred do?
A She worked in two different hospitals in the city of Astoria, Columbia Hospital, and I believe that there was also another hospital. I do not recall the name.

Q You remember the date that Mildred and you got married?
A Yes. We got married February the 24th, 1955.
Q May I approach the witness, Your Honor?
THE COURT: Go ahead. Mr. Wiley, scoot up a little closer to the mike, if you would. I think the round one amplifies your voice.
THE WITNESS: Okay.
THE COURT: Thank you.
Q Mr. Wiley, would you identify this photograph for me, please?
Can't show it till we submit it.
A This is a wedding picture of our wedding. It took place in Lebanon, Indiana, February the 24th, 1955.
MR. MOTLEY: Your Honor, we move this into evidence as Exhibit 1.
THE COURT: Is that marked, Counsel?
MR. MOTLEY: It hasn't been marked yet.
THE COURT: Any objection?
MR. OHLEMEYER: No objection.

MR. WAGNER: No objection.
THE COURT: Plaintiffs' 1 will be admitted.
(Plaintiffs' Exhibit(s) 1 received in evidence.)
MR. MOTLEY: Your Honor, so that everyone may see this, may I show it on the --
Q Is this the wedding picture, sir?
A Yes. That is the wedding picture.
Q From that date of your marriage until her death, June 24, 1991, were you and Mildred happily married?
A We were happily married. We had a good relationship. I was telling some people here a while back, if we had a little problem, misunderstanding, during the day, we had that taken care of before we went to bed at night.
Q You discussed any problems before you went to bed.
A That's right. We did.
Q And you had two children from that marriage.
A We have two children, two fine children.
Q And are they in the courtroom today? Can't

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be. I'm sorry. I forgot.
A No, sir.
Q Okay. Were you with them last night?
A Yes. I was with them last night.
Q And are they here in Muncie, Indiana?
A Yes, they're here in Muncie.
Q And you expect they will testify to the jury this week.
A Yes. I expect them to testify.
Q And what are their names?
A Carla Addington and Gary Wiley.
Q Your son, Gary, what does he do for a living?
A Gary is a missionary. He's been a missionary in Lima, Peru, South America, for the past ten years. And he came home for this trial. My daughter is a minister's wife, and her name is Carla Addington. Her husband is a minister in Lancaster, Pennsylvania.
Q You can take the photograph down, please.
Mr. Wiley, do you miss Mildred?
A I miss Mildred. We had a special relationship. I had a difficult year the first year that I was without her. We just

had a partnership through life that, it's hard to describe. Never had a falling out in those 36 years. We had misunderstandings at times, but we had a lovely relationship. And she gave to me two beautiful children.
Q Mr. Wiley, I believe you heard Mr. Howard, you were in court yesterday, for the opening statements, were you not?
A Yes.
Q Mr. Howard described where your wife was buried to the jury. Would you tell them where your wife is buried.
A My wife is buried in Fairmount, Indiana, just a little bit north of the city there. The only cemetery in Fairmount. That is where she's buried.
Q And do you have a funeral plot there, too?
A Yes, I do. My name is also on the gravestone.
Q Mr. Wiley, tell the jury a little bit about your background. You said that your father was a farmer, at least in part. How many brothers and sisters did you have?
A I have three brothers. You want to know the names of my brothers?

Q Well, one of them lives [DELETED], so what is his name?
A Okay. My youngest brother, Mark; Don; and my brother Charles, he passed away in 1963.
Q Does your brother, at least in part, still live in the [DELETED] area?
A My one brother lives here in the [DELETED] area. My oldest brother, he lives in

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[DELETED]
Q Now, you told us that you went to Frankfort Pilgrim High School; correct?
A That is right.
Q And Frankfort Pilgrim College?
A Yes. On the same campus.
Q And how old was Mildred when you met her?
A Let's see, she must have been around 16, I believe, when I first met her. Fifteen or 16.
Q You began dating while she was a senior in high school?
A That is right.
Q I think we have a photograph here.
MR. OHLEMEYER: No objection.
Q Would you describe this? Who is that a picture of?

A That's a picture of Mildred, and she was a senior at that time in high school. That's her graduation picture.
MR. MOTLEY: Your Honor, we move in admission as Exhibit 2.
THE COURT: Any objection.
MR. OHLEMEYER: No, Your Honor.
THE COURT: 2 will be admitted. You can publish.
(Plaintiffs' Exhibit(s) 2 received in evidence.)
MR. OHLEMEYER: No objection.
Q Now, while this picture is on the screen, Mr. Wiley, would you tell us what qualities in Mildred attracted you to her?
A She had an outstanding personality. She was a go-getter. She wanted to be on the winning side. She was just a lovely person overall.
Q What kind of values did you come to appreciate that she had?
A She had high values. She wanted to live a clean and moral life. And wanted to live a life that she could serve other people, take care of their needs.

Q Did your wife drink or smoke?
A She did not drink or smoke.
Q What was her family upbringing like, as you learned it.
A Well, as I learned it, she was born of missionaries. Her father was a minister for a number of years, all of his life, I should say, and they lived good, clean moral lives.
Q Mr. Wiley, do you think or do you know of anyone who is more familiar with the conduct and life of Mildred Wiley than yourself?
A I know of no one.
Q Were you and Mildred Wiley friends as well as married?
A She was my best friend.
Q Were you in court yesterday, sir?
A Yes, I was in court yesterday.

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Q And you heard statements made about the life of your wife, did you not?
A Yes, I did.
Q Did you listen carefully?
A Yes, I did.
Q When your wife worked at the VA Hospital, she started in 1973; correct?
A That is correct.

Q Were you home most every day when your wife got home from work?
A Just about every day I would be home.
Q When you were home and she came home from work, what was one of the first things she would do?
A She would embrace me, give me a kiss, just glad to be home and to see me.
Q Did she change clothes?
A Yes. She had a special closet where she would hang her coat. It wasn't near my closet. And she would remove her uniform and take it to the laundry room.
Q Why was that?
A Because it had a stench of smoke, tobacco smoke.
Q Do you know that? Do you remember that clearly and unequivocally in your mind?
A I will never forget that in my mind.
Q Now, Mr. Wiley, before 1991, were you aware of or had you heard or had you studied whether or not secondhand smoke, or environmental tobacco smoke, caused lung cancer, before 1991?
MR. WAGNER: Objection, Your Honor.

It's irrelevant as to what this witness might know.
MR. MOTLEY: Your Honor, it goes to the deceased's state of mind, what she might have known, discussed with him.
THE COURT: Objection overruled. You may answer.
A She had no idea. We had no idea that one day she was going to die from the passing smoke of cigarette smokers.
Q It was stated --
MR. WAGNER: Your Honor, I'm going to have to move that that answer be stricken. Your Honor, it's a voluntary statement on the part of the witness. There's no foundation laid that this witness knows anything about the cause of Mrs. Wiley's cancer and death. That was a voluntary statement that he made that wasn't responsive to the question. I know that's his objection and not mine.
THE COURT: It is, but you are correct. It was not responsive. The response of Mr. Wiley will go out. I'm admonishing the jury to disregard his

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response.
He didn't answer your question, Counselor.
Q Listen carefully to the question, Mr. Wiley.
A Okay.
Q Did you know, you, Philip Wiley, know that secondhand smoke would cause lung cancer before 1991?
MR. WAGNER: Once again, for the record I have to object, Your Honor. It's not relevant as to what this witness may or may not have known. This is a lawsuit about Mildred Wiley, not Mr. Wiley.
THE COURT: I am going to sustain the objection. I don't like the way the question is phrased, but I'm not sure -- the reasons for your objection are correct, but I'm going to sustain the objection.
You want to rephrase that, Counselor?
Q Mr. Wiley, did you and your wife discuss matters of her personal health from time to time over the course of marriage? Are you aware that she went to the doctor, for example?
A Yes, I was aware that she went to the

doctor.
Q And did you discuss matters of your health and her health?
A That is right. We did.
Q And did you discuss her work?
A That's right.
Q And were you, sir, ever advised by Mrs. Wiley, while she was alive and before she got sick, were you ever advised by her that she knew that secondhand smoke caused lung cancer?
MR. WAGNER: Objection. Object to that, Your Honor. That would be hearsay, repeating what somebody else said, the witness is not here in court.
MR. MOTLEY: No, sir, Your Honor. That goes directly to the state of mind of both him and her.
MR. WAGNER: Well, it's not the state of mind, Your Honor, he's asking her -- he's asking this witness to testify to something that was said by somebody else.
THE COURT: Objection is sustained.
MR. WAGNER: Thank you, Your Honor.
Q Mr. Wiley, did you ever have a discussion

with your wife before 1991, don't tell us what she said, did you have any discussion with her about whether secondhand smoke caused lung cancer?
A No.
Q Did there come a time in October of 1990 your wife developed a cough that would not go away?

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A Yes, she developed a cough in the month of October of 1990.
Q That's all I asked.
A Okay.
Q I'll go question by question. You need some water? Would you like some water?
A Yes, please.
MR. MOTLEY: Your Honor, can I get the witness some water?
THE COURT: Sure.
THE WITNESS: Thank you.
Q Mr. Wiley, let me ask you this, I forgot to ask you. Have you testified in court like this before?
A This is my first time.
Q The rules are, you got to listen real carefully to the question and not volunteer

information, okay?
A Yes.
Q All right. Now, we were talking about October 1990, when your wife developed a cough, okay?
A Yes.
Q Did you say something to your wife about what her cough sounded like?
MR. WAGNER: Well, Your Honor, I would object to this, as this is going to call for this witness's interpretation of what his wife's cough sounded like in a medical sense, and it would have no relevancy. Mr. Wiley is not a doctor, not capable of making a diagnosis.
THE COURT: Objection is overruled. You may answer that question. You remember the question?
Q You want the question again? Did you make a comment to your wife --
A Yes.
Q -- about what her cough sounded like?
A I told my wife in a joking way that her cough sounded like it's a smoker of cigarettes.

Q Now, don't tell us what she said, but did she respond to you? You can't tell us what she said right yet, but did she say something back to you when you told her she sounded like a smoker's cough?
A Yes, she did.
Q She did say something back to you, correct?
MR. WAGNER: Asked and answered.
A Yes, she did.
Q And is it true, Mr. Wiley, that to your personal knowledge, your wife had never smoked a cigarette in her entire life?
A That is true.
Q Did she relate that to you at anytime during her entire life?
A Yes.
Q Now, it was stated in open court yesterday

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by the defendants that you and your wife avoided smoke in restaurants. You recall that?
A Yes. I do.
Q Is that true?
A That is true.
Q Why did you avoid smoke in restaurants?
MR. WAGNER: Your Honor, I'll object. The question as to why this witness would have done something is not really relevant.
MR. MOTLEY: Your Honor, he was with his wife.
THE COURT: Overruled. You may answer.
Q Why did you and your wife avoid smoking in restaurants?
A Working in the VA during the week, well, she felt that she didn't have to put up with that in going to restaurants, so we would always ask for a nonsmoking area.
Q Mr. Wiley, did you and your wife have religious or moral reasons why you chose not to smoke?
A That is true.
Q So what is the reason why you and your wife chose, as partners, not to smoke?
A We just felt it was harmful to our health. It was a nuisance to be around.
Q Cigarette smoke?
A Yes.
Q In your presence, sir, did your wife, Mildred Wiley, ever say she was fearful of getting -- before 1991 now, okay?
A Yes.
Q Let's get the time. Before October 1990. Did Mildred Wiley ever express to you in your presence that she was fearful of getting lung cancer from secondhand smoke?
MR. WAGNER: Objection, Your Honor. Hearsay.
THE COURT: Objection sustained.
A No, she did not.
THE COURT: You don't have to answer that.
THE WITNESS: I'm sorry.
THE COURT: Jury is admonished to disregard his response.
When I sustain an objection, Mr. Wiley, that means you do not have to answer.
THE WITNESS: Thank you.
Q In any writing that was exchanged between you and your wife -- did you all exchange notes and writings from time to time?
A From time to time.
Q In any writing that your wife may have given to you, did she ever express any fears before 1990 of lung cancer from

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environmental tobacco smoke?
MR. WAGNER: Same objection, Your Honor. That's hearsay.
THE COURT: Objection sustained. You don't need to answer that.
Q Was your wife a person who would likely -- strike that.
MR. MOTLEY: I'm sorry, Your Honor. If I might remove that piece of a question?
THE COURT: All right.
Q Did your wife manifest to you and did you observe that your wife was a person who was concerned and took care of her health?
A Yes, sir.
Q Mr. Wiley, when you and your wife were in Oregon, I believe you said that was in 1950s; is that correct?
A Yes.
Q And you were a minister of the church.
A That's true.
Q She was a nurse.
A Yes.
Q Was she ever, to your personal knowledge, a nurse who specialized in lung disease, that is worked on a lung disease ward?

A No, sir.
Q Same question about a lung cancer ward.
A No, sir.
Q What kind of nursing practice, as you observed it, did your wife have?
A A maternity nurse, a surgical nurse, also nursery.
Q You mean little babies?
A Little babies.
Q And at the VA Hospital, what ward principally did she work on?
A Psychic ward.
Q Psychiatric ward?
A That's right.
Q Now, Mr. Wiley, you heard a lot of reference yesterday by the defense lawyers to your wife's exposure at the VA Hospital; did you not?
MR. WAGNER: Your Honor, I'm going to object to the form of the question as to counsel's references as to what was said in opening statement to this witness as a preface.
MR. MOTLEY: I have the transcript here.

MR. WAGNER: It doesn't make any difference.
THE COURT: Sustained. Rephrase the question.
MR. MOTLEY: Your Honor, I would like to show the witness the transcript of what the counsel said yesterday about Ms. Wiley's exposure and ask him some questions

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about it.
MR. WAGNER: Your Honor, he can ask the questions directly, without reference to what was said in opening statement to this witness. This is not a situation where he can reference what was said in opening statement by counsel for the parties as to what the evidence may or may not prove. It's bad as to form and as to substance to frame a question in that way.
MR. MOTLEY: Counsel made promises to the jury, Your Honor, about what testimony would be, here's an eyewitness, I want to ask him if those were true.
MR. WAGNER: Well, we didn't make any promises to the witness. We stood up to this Court, as Your Honor has told the jury,

we told the jury what we believe the evidence will prove. He doesn't need to refer to what was said in opening statement in bringing questions to this witness. It's not a proper form of questioning the witness. He can put the question to the witness directly. I object to it for that reason.
MR. MOTLEY: I think I'm entitled to ask this witness if the representations by this lawyer were true or false that they made to this jury.
MR. OHLEMEYER: Your Honor, at that point I object to that, I don't think that's the purpose of the witness's testimony. He should ask him questions and elicit evidence from him. Not elicit comments from this witness about the truth or falsity of something we said to the jury in a part of the trial that Your Honor has already instructed the jury on. It's not the way you conduct a direct examination.
MR. CROSS: Your Honor, please, can I be heard?
MR. WAGNER: This witness is not

here to testify as to what was said by the counsel in opening statements to this jury. The witness is here to testify as to what he knows based upon his personal knowledge in answer to direct questions about matters that are relevant to this lawsuit, not to comment or to be questioned about what was said by counsel in opening statement. It's just wholly improper, Your Honor.
MR. CROSS: If Your Honor please, two points. First of all, you can search the rules of evidence till you dream about them at night, that there is nothing in the rules of evidence which would prevent a question and answer such as Mr. Motley is trying to elicit in this evidence. They can say it's improper. They can say it's

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inadmissible. It's clearly wrong, there's no authority to support what they said.

Secondly, the Indiana case law is replete with examples of cases where it has been held that by making statements in opening argument you can open the door to evidentiary matters which otherwise would not be material to the case at trial.

MR. OHLEMEYER: The basis of my objection, Your Honor, was the questions as formed are argumentative.

THE COURT: The objection Mr. Wagner spoke is well taken. The objection is sustained.

Go ahead, Mr. Motley.

Q Mr. Wiley, it is true that Mrs. Wiley was not on the floor treating patients all that often, to your personal knowledge?

MR. WAGNER: Your Honor, there has to be a foundation laid as to this question, first of all, first of all as to the witness's personal knowledge. There's no foundation laid this witness has knowledge about what Mrs. Wiley did every day in the Veteran's Administration Hospital. There has to be a foundation laid here. I'm not even sure what floor we're talking about.

THE COURT: I'm not clear either. Make the question more specific.

Q Mr. Wiley, are you aware of what your wife did at work?

A She would come home and tell --

Q No.

THE COURT: You can answer that yes or no.

A Yes. I'm sorry.

Q Yes or no?

A Yes.

Q Okay. And give us all the reasons why you know what she did at work.

A Restate your question again, please.

Q All right. Did you visit your wife at work?

A Yes, I --

Q Did you pick her up at work sometimes?

A Sometimes.

Q And did you have discussions with your wife about her work?

A Sometimes we talked about it.

Q And did you observe her at the hospital in the VA Hospital, ward 16, during her work?

A Yes.

Q Now, based on your knowledge, though, you weren't with her every day; correct?

A Yes.

Q Based on what you observed, when you were observing your wife at work, your personal observations, is it true that she was not on the floor treating patients that much?

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MR. WAGNER: Well, Your Honor, that question is so vague it has no probative value. She was not on the floor that much treating patients? I mean, there is no foundation laid, it has no probative value.

THE COURT: Objection is overruled. You may answer that. Did you understand the question, sir?

A The question once again, please.

Q Yes, sir.

A In order to be clear.

Q Take a deep breath if you're nervous, okay?

A Yes.

Q Did you observe, although you weren't there every day, when you observed your wife at work, would it be true to suggest that she did not treat patients that much from your observation? Is that true or false?

A That's false.

MR. MOTLEY: Your Honor, we move the admission part of the nurse's record, part of the employment record we referred to yesterday.

MR. OHLEMEYER: No objection, Your Honor.

THE COURT: That will be Plaintiffs' 3. Any objection?

MR. OHLEMEYER: No objection, Your Honor.

THE COURT: Plaintiffs' 3 will be admitted.

(Plaintiffs' Exhibit(s) 3 received in evidence.)

Q Mr. Wiley, these are part of your wife's, what's called proficiency report, do you see that on the top?

A Yes, I do.

Q Exhibit No. 3, Medical Center, Marion, Indiana. You see that?

A Yes.

Q Then it says the date is August 1, 1973?

A Yes, sir.

Q No excuse me, it's -- that's the date she started. This is a period from August 1 of 1980 to August 1 of 1981, one-year period. Do you see that?

A Yes, I do.

Q She's been on the service for eight years? Okay?

A Yes.

Q Now, would you turn to page 2? And the jury can look.

MR. MOTLEY: Your Honor, we just highlighted this so the jury can see it better.

THE COURT: All right.

Q About your wife, it says, "Nursing assistants" told this RN -- "hold this

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registered nurse"; can you see that?
A Yes.
Q "In particular high regard as she gets out on the floor and works along with them encouraging them both verbally and by her example." It's about nursing assistants. You see that?
A Yes, I do.
Q "Though the greatest portion of the patients on this floor are unable to verbalize, this nurse," talking about your wife, "converses with the patients continually orienting them to reality while she is working with them." You see that, sir?
A Yes, sir.
Q Now, is that document record performance of your wife consistent with what you observed

on the occasions when you were at that hospital?
MR. WAGNER: Objection, Your Honor. There's no foundation laid for such a question that this witness knows in particular about those particular matters.
THE COURT: Overruled. Goes to the weight. You may answer.
A Yes, sir.
Q And from what you observed was she what would be called a hands-on nurse?
A Yes.
Q In 1986, I believe the records demonstrate, your wife was promoted to head nurse. Do you recall that?
A Yes, sir.
Q Do you recall the occasion when that occurred?
A Yes, sir.
Q Did you observe that your wife was happy or sad that she had received this honor and promotion?
A I believe that she was glad about it.
Q From your observations, Mr. Wiley, tell the ladies and gentlemen of the jury in your own

words what you've observed about your wife and her pride in her nursing career.
A She had -- she had a pride about working with her patients. She would go out on the floor and she would talk with them. She, appeared that she was on a mission, just to encourage and help those that were sick. And she come home, she would tell me about the days that she spent with different patients. And that was -- that was her life. She enjoyed it very much.
Q Mr. Wiley, after she was promoted in 1986, did you continue from time to time to visit her at work?
A Probably more because she had her own office at that time.
Q And so would you visit her weekly, biweekly,

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monthly, or how often? At work.
A At least once, once or two times a month.
Q And you just stated she had her own office; correct?
A That's true.
Q On the occasions when you visited your wife when she was the head nurse, was her door closed or open to the patients and the

staff?
A She had an open-door policy.
Q And from your own personal observation at the time, did your wife, while she was head nurse, move about the floor when you were there, that is the floor of the hospital, or did she stay stationed to a chair in that office?
A She moved about the hospital. You want me to answer more?
Q Well, what did you observe?
A Okay. There was times that she was short of staff and so she would go out on the floor and she would work as a staff nurse. At night she would bring her paperwork home because she didn't have time to take care of it.
Q Time while she was at the hospital to do paperwork?
A That is true.
Q Mr. Wiley, going back to the hospitals that she worked at in Oregon; do you recall those, sir?
A Yes, sir.
Q Did you similarly visit her at those

hospitals back in the '50s when she was working as a nurse?
A Not as much as at the VA Hospital.
Q Well, did you ever go to visit her at the hospital in Oregon?
A Very few times.
Q You did go more than once, though.
A Yes, sir.
Q When you went to that hospital, did you observe what she was doing as a nurse on the floor of those hospitals?
A Yes, sir.
Q All right. And sir, did you observe, while your wife was working in that hospital in Oregon in the late '50s, whether or not any patients or staff were smoking in her vicinity?
MR. WAGNER: Objection, Your Honor. It's not relevant. It's outside the issues in this case, it's outside the contentions of the plaintiff in this case that smoking exposure of Mrs. Wiley is strictly that in the Veteran's Administration Hospital, which is the same issue that we brought to the Court's attention before.

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MR. MOTLEY: That is absolutely incorrect. I'll be glad to argue it in front of the jury or if you want me to approach this, it may be prolonged. He's misstated what our contentions are.

MR. WAGNER: This is the same issue that we encountered in opening statements. In fact, as up may remember in regard to one of the demonstrative exhibits that plaintiffs used in opening statement (inaudible).

MR. MOTLEY: You said it was subject to us proving it up in the case, which is what I'm now doing.

MR. WAGNER: Well, it isn't a question of proving it up, Your Honor. It's a question of what was in their pretrial contentions what the scope of this lawsuit is.

THE COURT: At this point I'm going to sustain the objection. I may rethink that later, Counselor.

Go ahead. Move on to another area.

MR. MOTLEY: Your Honor, I would ask at a certain point in time, then, for

the basis of your reconsideration, when the jury is not in here, to make a proffer of what he knows about those other exposures because we believe we've alleged them in the complaint.

THE COURT: We'll, do that.

Q I'll move on to something else now, okay. We had jumped back to Oregon, okay. So let's reorient us where we are. Let's go back to the VA, all right? Now, you remember she went to work there in 1973?

A Yes, sir.

Q Throughout the period of time that she worked at the VA Hospital before she was promoted to head nurse, that was '73 to '86, correct?

A Yes, sir.

Q All right. On the occasions when you would go to the hospital, yourself --

A Yes, sir.

Q -- would you tell the Court and jury in your own words whether or not you observed any smoking in the vicinity of your wife, that is smoking of cigarettes, what you observed?

A Yes, sir. I did.

Q Would you explain it.

A In the early days, the nurse's station was across the hall from the day room, and that's where the patients were in recliners, and about 98 percent of them smoked and that smoke was right in that area.

Q Did you observe at the VA Hospital, sir,

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from 1973 to 1986, whether any of the nurses smoked?
A Yes, sir.
Q Do you remember the names of any of the nurses that you saw smoking in the presence of your wife?
A No, sir. I can't tell you today.
Q Mr. Wiley, when your wife would come home from work, again 1973 to 1986, did you observe about her body and her clothes anything you could sense, smell or touch that might relate to cigarette smoke?
MR. WAGNER: Asked and answered, Your Honor.
MR. MOTLEY: No, sir, I haven't asked that question.
THE COURT: Not that precise

question.
You may answer.
A When we'd go to bed at night, I could smell cigarette smoke in her hair. That was every night, Monday through Friday.
Q Now, Mr. Wiley, it was stated that you did not measure the smoke that was on the halls of the hospital where Mildred worked from 1973 to 1986. You recall hearing that?
MR. WAGNER: Your Honor, object to the question.
MR. MOTLEY: Let me ask it a different way.
THE COURT: Restate it.
Q Did you authorize anybody to go out with a machine and test how much smoke was in the air between the years of 1973 and 1986?
A No, sir.
Q Why didn't you?
MR. WAGNER: Your Honor, objection as to why would the witness.
THE COURT: Sustained.
MR. WAGNER: Thank you.
MR. MOTLEY: May I approach on that, Your Honor?

THE COURT: Why don't you move on. Let's go ahead.
Q Had you ever heard of how to measure smoke in 1973?
MR. WAGNER: Your Honor, it's not relevant as to --
THE COURT: You can answer that.
A No, sir.
Q Did you?
A No, sir.
Q You did not?
A No, sir.
Q Same question, 1986?
A No, sir.
Q Same question, 1989?
A No, sir.
Q Did anyone suggest to you, sir, in 1990,

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that you should go and hire a machine to measure smoke at the hospital?

MR. WAGNER: Your Honor, that's irrelevant and hearsay.

THE COURT: You can answer that yes or no.

A No.

Q Is it true, sir, that you did not at any

time measure smoke at the VA Hospital between 1973 and June 1991?

A No, sir.

Q You did not.

A No, sir.

Q Did you recall a Mr. Crisman at the VA?

A I know of the name, but I don't know him personally.

Q Do you have any personal knowledge as to when he went to the VA Hospital in Marion?

A I could be wrong about the year, but it seemed like it was 1987.

Q To your personal knowledge, from the time that your wife was a regular nurse, not a head nurse, from 1973 to 1986, you don't recall ever encountering Mr. Crisman?

A No, sir.

MR. MOTLEY: Your Honor, what time did you say you were going to take a morning break?

THE COURT: Well, we had a later start today. I was going to take it at 10:00. Now that you bring it up, I think we'll take it now. We've been going about an hour and a half.

Remember, ladies and gentlemen, during the break, you may leave your notes on the chair, nobody will be around, don't talk about the case with anyone else, you're free to go outside if you like. If anybody does approach you, tell them you're a juror. If they persist, tell me about it. We will break for 15 minutes, then we will take a noon break promptly at noon for food reasons, so all right. We'll break.

MR. MOTLEY: Your Honor, Judge, I'd like to, if I might, if this is convenient with the Court or whenever is convenient.

THE COURT: Let's come in five minutes before we begin. We're in recess.

(A brief recess was taken.)

THE COURT: We're back on the record. Jury is not present. When we left, there was an issue regarding a question involving Mr. Wiley's recollection of Mrs. Wiley's employment in the State of Oregon, as I recall, and there was an objection.

Mr. Motley, perhaps you could enlighten the Court as to what you seek to offer here

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and the purpose.

MR. MOTLEY: Your Honor, I'll be glad to do that, if you'd let -- could I allow Mr. Cross to argue, because I'm a late arrival to the procedures of this case. In other words, the original complaint and all that.

THE COURT: That's fine.

MR. MOTLEY: The purpose here, Your Honor, is we believe that the plaintiff was exposed, most intensely, as we have alleged all along, at VA Hospital. Nevertheless, she was exposed in a less offensive way other times in her career that Mr. Wiley personally knows about. And that we can lay the predicate for expert testimony about this through the witness who observed, as he's already testified, or attempted to testify, that she was around smoke in Oregon.

There are other instances, too, Your Honor, as you may recall. She was a nurse for 31 of her 36 years, at various places. I was going to lay a predicate with him, from his own personal observation, what he

observed. Then the experts are entitled then to base their opinions on the testimony that's been reasonably placed before the jury.

Now, there's another issue here, that's the one I'd like Mr. Cross to address, that is whether or not the defendants have reasonably been put on notice that we are claiming that while, no question about it, the vast majority of the exposure was at the VA Hospital, but have they been placed on reasonable notice we contend there were other exposures, not nearly as intense, antecedent in time.

THE COURT: Thank you, Mr. Motley, I'm glad Mr. Cross is here.

Mr. Cross, you authored the plaintiffs' contentions?

MR. CROSS: I contributed to their authorship, Your Honor.

THE COURT: Let me rephrase that. You signed the plaintiffs' contentions.

MR. CROSS: I did, in fact.

THE COURT: No. 4, as I read it, plaintiffs contend the defendants

manufactured, sold and distributed or otherwise put into the stream of commerce products which were in defective condition.

No. 3, plaintiffs contend plaintiff's prolonged exposure to secondhand smoke generated from the use of defendants' tobacco products by patient at US Veteran's Hospital in Marion, Indiana, during the

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course of her employment as a nurse to cause the plaintiff's lung cancer and consequent death.

Now, the argument I think will be, and they will correct me if I'm wrong, but I think will be how then is it relevant to what happened in Oregon.

MR. CROSS: Well, Your Honor, we stand by both of those propositions. Let me tell you exactly why this, why they are seeking to exclude us from talking about that.

You'll note that the Court's cutoff of the filing of statements of contentions was September 5, 1997. And that was about the same time that witness lists were exchanged as well. The plaintiffs and defendants

travelled all over this country taking depositions of various experts. And during the course of those proceedings, it became apparent that the defendants were going to raise some issues as to latency of cancer and perhaps raise the argument that Mrs. Wiley's cancer could not have originated during her tenure at the VA Hospital because this particular type of cancer has a proclivity to remain -- to originate and remain dormant and that perhaps it might have originated before the VA exposure.

When we submitted our contentions, we did not know that this type of defense might be coming. I would point out to the Court that it would not be fair to us to restrict us to testifying about the exposure during the VA tenure of her employment. The reason that that was the primary focus of our case and still is the primary focus of our case is because we have substantial evidence as to her continuous exposure to excessive cigarette smoke during that tenure. We also do not contend, necessarily, that her cancer

originated during the time at the VA Hospital.

We do contend that her exposure to that smoke on a continuous and excessive basis for 17 years certainly advanced and accelerated that cancer. And as such, it is a contributing cause, which under the Products Liability Law, would make the defendants liable for the defective nature of their product and the damages it caused.

I would submit to the Court that if we go all the way back to the complaint which was filed in May of 1993 we alleged in paragraph 13, during Mildred Wiley's employment she was subjected continuously to secondhand smoke. And then we allege for approximately 17 years before her death, on

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a regular and continuing basis, Mildred Wiley was exposed to and unintentionally inhaled ETS. Dichotomy in our evidence is established five years ago. We say she was continuously subjected to secondhand smoke during her work as a nurse, all 31 years, and we also say that during the time -- the 17 years before she died, in particular, she

was exposed on a regular and continuing basis. We do not have the kind of proof of her exposures in Oregon and Pennsylvania and Indiana, even Ball Memorial Hospital, the other hospitals where she worked, although we do have evidence that she was exposed to smoke there. What we do have clear and convincing evidence of is the exposure on a regular and continuing basis for the last 17 years of her life.

I might also point out that the preliminary instruction, which has already been read to the jury, also supports that dichotomy. Plaintiffs claim that Mrs. Wiley died of lung cancer as a result of her exposure to environmental tobacco smoke which is commonly referred to as secondhand smoke or ETS. There's no time or place reference to that.

The next sentence of that preliminary instruction says, the plaintiffs further allege that Mrs. Wiley was a nonsmoker who was exposed to ETS during her 17 years as a nurse at the VA Hospital in Marion. So the dichotomy is even present in the Court's

preliminary instruction.

It is not fair that we be held to a standard of trying to argue that the only thing that is relevant here is her exposure during the 17 years when the pleadings and everything as this case has developed supports that.

5The statement of contentions were prepared at a time when we did not know that these defenses would be forthcoming and if you take other aspects of the statement of contentions, it is seen that the thrust of this case is not to focus the entire extent of the defendants' liability to those 17 years. The thrust of this case is that this is a defective product that the defendant companies have manufactured, distributed and sold for Mrs. Wiley's entire lifetime, and especially her working life.

The contentions state that it is the action of the defendants in manufacturing, distributing, selling or otherwise placing into the stream of commerce such defective products, and that the defendants are liable to the plaintiffs for the damages they have

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sustained as a proximate result. We have -- there is nothing inconsistent with our statement of contentions, our complaint, we proceeded in that way all the time.

What defense seeks to do at this point is to try and box us into those particular 17 years, and they're going to trot out some experts who are going to say, well, this cancer had to have been more than 17 years old at the time of her death by reasons of factual evidence and those opinions and factual evidence wasn't before us at the time we wrote the statement of contentions, so it is not fair for us to be held by their interpretation of what the statement of contentions were when they were lying in the bush with the defense that we did not know until we started taking depositions a couple months later.

THE COURT: Mr. Ohlemeyer?

MR. OHLEMEYER: Yes, Your Honor. The proffer, as I understand it, goes to the issue of causation, which is an essential element of the plaintiffs' complaints, something they have to allege and prove.

Mr. Cross's statement is not quite accurate. It's not a defense.

What this evidence is designed to respond to is a statement made by their expert witness at his deposition. And it was a very simple statement. He said this type of cancer can begin growing 20 years before it's detected. But that's the first point, Your Honor. It's not a defense or it's not something that we've laid in the bushes on. It's a statement of their own expert made at a deposition in this case.

But the fact of the matter is this: Their complaint was filed, their second amended complaint was filed in August of 1994. In May of 1997, we asked the plaintiffs to admit in a request for admission that the plaintiffs have no evidence to prove and cannot prove at trial that Mrs. Wiley inhaled or breathed environmental tobacco smoke produced by any specific brand of cigarettes manufactured and sold by any of the defendants.

The plaintiffs' response to that discovery request was that various witnesses

have and will testify that brands manufactured by each of the defendants were sold at the VA Hospital and smoked by patients in the VA Hospital where Mrs. Wiley worked.

Then in September of 1997, the contentions were filed, and you'll note in the paragraph that precedes the numbers, the

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plaintiffs said that they were filing these prior to completion of discovery and they were subject to revision or addition. So if they had a supplement to make, they presumably could have made it at or near the time that Dr. Roggli gave the testimony they apparently now complain about.

But the fact of the matter is, that after they filed their complaint, we asked them discovery requests, where they specifically allege that the evidence on exposure and causation was connected to the VA Hospital. They filed their statement of contentions and limited their claim that the cause of her death was the exposure at the hospital. They might have filed an amendment at pretrial conference, they might

have filed an amendment before opening statement, but in the middle of direct examination of a plaintiff, Your Honor, I think that it's a little late to start trying to amend the pleadings or amend the contentions. I think the record is very clear on this and I think Your Honor should deny the proffer of evidence.

MR. WAGNER: I just want to add one very brief point. I know Your Honor knows this, that is, Indiana law is quite clear that pretrial contentions that are filed, which Your Honor has before you, replace the pleading, discovery, and everything else and ties down the legal theories of the parties in a case. And those pretrial contentions are unequivocal as to what the plaintiffs were claiming as the cause of Mrs. Wiley's cancer and death in this case. And it's too late now, and just because something came up in some discovery deposition and now they want to change their whole theory, our entire case preparation has essentially been geared to what they said in their contentions, and they can't change it in the

middle of trial.

THE COURT: Mr. Cross?

MR. CROSS: Yes, Your Honor. Brief rebuttal. We are not changing our contentions. We have been consistent since the outset. Again, you can, Mr. Wagner can characterize our submissions however he wants to. It's simply not there. I stand by everything that Mr. Ohlemeyer read in response to the request for admission. We don't have any burden of proving that a specific brand was smoked on a particular day and that Mrs. Wiley inhaled a particular brand of cigarettes at any specific time. We have been consistent at this trial so far. In opening statement, Mr. Motley said those very things, that we are going to

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establish the evidence will demonstrate her exposure was continuous throughout her employment.

Finally, I would submit once again this is, it is immaterial and we have never alleged that her cancer specifically and unequivocally originated there. We know that she was exposed to it during that 17

years, that is the material fact. And we should not be -- we should not be prejudiced by having them come around and trying to establish the cancer originated somewhere else, albeit still by their products, somewhere else, and then say that the VA Hospital exposure had nothing to do with it. That's simply beyond -- it tends to misrepresent the record and is beyond what's fair in this matter.

THE COURT: If the defendants choose to present evidence as Mr. Cross relates in their defense, that is another matter. But at this point, there's no question that we are bound by the plaintiffs' contentions. Plaintiffs' contentions are clear, unequivocal. The objection is well taken in my mind, Counsel, and it will be sustained to that line of questioning at this point. It may change, however, depending on defendants' posture here. But there's a reason we have statements of contentions from the plaintiffs and the defendants and we have to live with those statements.

All right. Bring in the jury.

MR. CASSELL: All rise.

THE COURT: Be seated. Jury back in its entirety, together with all three alternates.

Mr. Wiley. Would you again state your name for the record.

THE WITNESS: Philip Wiley.

THE COURT: You recognize you're still under oath, sir?

THE WITNESS: Yes, sir.

THE COURT: All right.

Mr. Motley.

BY MR. MOTLEY:

Q Little more relaxed?

A Yes, sir.

Q This is the second time you've testified before the jury now, right?

A Yes, sir.

Q Earlier and now.

Mr. Wiley, if the defendants claim that there was common knowledge that cigarette smoking, secondhand smoke caused disease in people, would you be one of those people who knew that cigarette smoke, secondhand smoke

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caused disease, serious disease in humans?
MR. WAGNER: Your Honor, there's no foundation laid for this kind of a question and it's completely irrelevant to anything.
MR. MOTLEY: To raise it as a defense, Your Honor, they've raised it as a defense. He's entitled to respond to that defense.
THE COURT: In terms of time, Counselor, you want to make your question more specific?
MR. MOTLEY: Yes, I will.

Q Mr. Wiley, from 1955 until May of 1991, if defendants claim that it was common knowledge amongst the public that cigarette smoking caused lung cancer, would you have been one of those people that knew that?
MR. MOTLEY: Your Honor, excuse me. I misspoke.

Q If defendants claim it was common knowledge between 1955 and 1991, did you, Phil Wiley, know that secondhand smoke caused lung cancer, yes or no?
MR. WAGNER: Objection, Your Honor. Sorry, Counsel. Objection, Your Honor.

This witness, there's no foundation laid that this witness can speak as to what the common knowledge was and what his personal knowledge would be would not be the common knowledge, so it's irrelevant. There's no foundation laid, and in any event there's also no personal knowledge on the part of this witness that's relevant to this case.
THE COURT: I think it's a fair question.
You may answer the question, Mr. Wiley.

Q Did you know, from 1955 to 1991, that secondhand smoke caused lung cancer, yes or no?

A No.

Q Now, you've told us about -- now I want to just talk about what you observed, okay? What you -- what you saw with your own eyes, sensed with your own mind, okay? Not what somebody told you. You understand where I'm going now?

A Yes.

Q I just want you to tell -- share with this jury your observations. From your observations of your wife, before she got

sick, and what you've already told the jury, your observations about how she conducted herself with respect to her own personal health, okay. Did your wife before she got sick, manifest -- do you know what that word means?

A Yes, sir.

Q Or exhibit, did she manifest or exhibit any

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fear that cigarette smoke at work was going to cause her cancer?
A No, sir.
Q Now, sir, let's turn to 1969 for a moment. Okay? Where did your wife work in 1969? What clinic?
A She worked -- she worked at the Davis Clinic, Marion, Indiana.
Q And was there a Dr. Davis who worked there?
A Yes, sir.
Q Did you -- what was his name?
A Dr. Joe Davis, Sr. and Jr.
Q And did you meet, I'm not trying to suggest you were best friends, but did you know Dr. Joe Davis, Sr.?
A Yes, sir.
Q And did you visit from time to time your

wife at that hospital?
A Yes, sir.
Q To your personal observation, did Dr. Davis smoke?
A Yes, sir.
MR. WAGNER: Your Honor, this is irrelevant again, Your Honor has already ruled on this issue, and so it's irrelevant for the reasons it's outside the scope of the plaintiffs' contentions.
MR. MOTLEY: I'm not asking him anything about exposure, I'm just asking him if Dr. Davis smoked cigarettes.
MR. WAGNER: Mr. Motley is, Your Honor, he's doing it in an indirect fashion.
THE COURT: Sustain the objection. You don't have to answer that question.
Q Mr. Wiley, do you know what benzoapyrene is?
A No, sir.
Q Do you know what polonium 210 is?
A No, sir.
Q Do you know what chemicals and additives cigarette companies place in cigarettes?
MR. WAGNER: Your Honor, this is all irrelevant.

THE COURT: You can answer.
MR. WAGNER: And there's no foundation laid that this witness might even know what these substances are, Your Honor.
THE COURT: You can answer. Objection overruled.
A No, sir.
Q You do not know?
A No, sir.
Q Do you recall that list of 40 carcinogens I showed the jury in opening statement?
A Yes, sir.
MR. WAGNER: Your Honor, objection as to references as to what counsel said in opening statements as a predicate for questions.
MR. MOTLEY: I asked him if he saw

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the list.
THE COURT: You can answer that yes or no.
Q Did you see the list?
A Yes, sir.
Q Did you know the names of any of those carcinogens on that list that you saw?
MR. WAGNER: Your Honor, again

that's irrelevant as to what this witness may or may not know. His knowledge of smoke and cigarettes and constituents is not an issue in this case and it's also wrong and bad as to form to ask witnesses questions about things that were said in opening statement. Your Honor has already ruled on that issue, I thought.
THE COURT: Objection overruled. You may answer.
Q Did you know the names or recognize the names or know anything about that list of 40 carcinogens that I showed you?
A No, sir.
Q Did you ever observe -- now, not what she told you, okay? Did you ever observe your wife physically react to smoke in her presence? That is, did she manifest any symptoms that smoke would affect her physically?
A It was an agitation and sometimes it brought tears to her eyes.
Q Mr. Wiley, in the course of your being an adult in society, since the mid-1960s, have you ever looked at, held, or inspected a

package of cigarettes manufactured by an American cigarette company?
A No, sir.
Q To your knowledge, sir, to your knowledge, did your wife or you receive any warning from cigarette companies that secondhand smoke or environmental tobacco smoke would cause lung cancer in nonsmokers?
MR. WAGNER: Your Honor, objection as to what this witness may or may not have received. It's not relevant to this case.
MR. MOTLEY: He's got a consortium claim, Judge.
THE COURT: Objection is overruled. You may answer.
Q Did you receive any warning, any word, any letter, anything, from these companies that, including Mr. Wagner's company, that secondhand smoke, environmental tobacco smoke would cause lung cancer in nonsmokers?
MR. WAGNER: Same objection, Your Honor.
THE COURT: Objection is noted and overruled. You may answer.
A No, sir.

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Q Mr. Wiley, to your personal knowledge, in the times when you and your wife were home, together, did you ever observe your wife reading any articles in nursing magazines about cigarette smoke, secondhand smoke causing lung cancer in nonsmokers? Did you ever observe that?
A No, sir.
Q Now, are you familiar with a waste dump somewhere near where you used to live?
A I didn't know about this dump until maybe a year ago.
Q Well, once you learned about it, do you know where it is physically located? Approximately where is it?
A Approximately, but I've never been there.
Q Okay. Well, approximately how far is it?
A About five miles.
Q Five miles from where?
A Where I lived in Jonesboro, Indiana.
MR. MOTLEY: Your Honor, may I use this for a second?
THE COURT: Go ahead.
MR. MOTLEY: May I ask Mr. Wiley to come down?

THE COURT: Certainly.
Q Mr. Wiley, I am not many things and one of them is an artist. I demonstrated that yesterday. And I am not a map drawer, either, so I want you -- and I know you're not a map drawer, either.
A No, sir.
Q You know this community better than I do, okay. Could you kind of put an "X" where approximately we are now, okay? Just wherever, this will be north, this will be south, this will be east, and this will be west. Okay. Would you -- I think that's right, isn't it?
A Yes.
Q Okay. Now, would you draw a circle in context of where we are in comparison to where you lived? You understand where I'm saying? Do an "X" as the courthouse here and a "Y" is where your house is? Is that how you do "Xs" and "Ys"?
A Sorry.
Q That's where we are. Now, where was your house, where you lived with Mildred?
Q Make that a "Y". Put a circle around it.

Now, where was that dump as you have learned existed that was five or six miles from your house? Put a circle around that. Was there any river to your -- what you've learned about where this dump is, in connection with your house?
A Yes, sir.
Q Where is that river? What river is that?

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A Missessenawa River.
Q The who?
A Missessenawa River.
Q I suppose you know how -- she knows how to spell that because I sure don't. I never heard of that river.
THE COURT: We know.
Q Does that river flow north or south?
A (indicating)
Q Goes that way?
A Yes, sir.
Q Okay. And generally in this part of the country does the wind blow west to east like it does in most places or is it different here?
A West to east.
Q Okay. Put an arrow right from there.

Now, in the entire time that you were living here, did there ever come an alarm by the fire department or rescue people or anybody saying that there was a toxic cloud coming down from north of you towards your house?
A No, sir.
Q Thank you. Remember what the name of that dump is?
A No, sir.
Q Well, before this lawsuit, did you ever hear tell of that dump and any waste or anything like that?
A No, sir.
Q Now, you told us you lived in Oregon; correct?
A Yes, sir.
Q Was there a paper mill close by your house in Oregon?
A No, sir.
Q How far away to your knowledge was the closest paper mill?
A I lived near the Columbia River, 12 miles from the Pacific Ocean, and the logs that were logged there went down the Pacific

Ocean to San Francisco 600 miles away.
Q Now, there are paper mills in Oregon, aren't there?
A Yes, sir.
Q Was there a paper mill near your house?
A No, sir.
Q To your knowledge, where was the closest paper mill in Oregon?
A After I moved away from Oregon, there is a place that's called St. Helens. Between '63 and '68, they built a paper mill, but I did not live there at that time.
Q I gotcha. And how many miles away was that? Even after they built it after you left; if you know.
A At least 50 miles.
Q So there wasn't a paper mill in the vicinity

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of your home when you and your wife lived in Oregon.
A That's right.
Q Now, you lived in Pennsylvania.
A Yes, sir.
Q Did you live on top of a coal mine?
A No, sir.
Q Where were coal mines in connection with

your house, if you know?
A I would say five miles. They were strip mines.
Q And was that five miles north, south, east, or west of where you lived?
A They would be east.
Q And again, the wind blows west to east in Pennsylvania also?
A That's true.
Q Did you ever see when you lived there a cloud of coal dust coming towards your house?
A No, sir.
Q You and your wife went to Suriname, if I pronounce that correctly, as missionaries?
A Yes, sir.
Q Her as a nurse; right?
A Yes, sir.
Q Tell the ladies and gentlemen of the jury where Suriname is.
A Suriname is on the northeast coast of South America. It borders Brazil on the bottom of that country and the Atlantic Ocean to the north.
Q How was it that you and Mildred came to go

to Suriname?
A My brother passed away in 1963. He and his wife were missionaries to Suriname. My church asked me, after he passed away, if we would fill in and go as missionaries, and I accepted that challenge.
Q And tell the ladies and gentlemen of the jury what it was like to be in Suriname as a missionary. This was in '63?
A Yes, sir.
Q Would you just describe the country, where you were, in general terms for the jury.
A It was a tropical rain forest. The average temperature the year-round was 85 degrees. About noon each day it would get up to 95, maybe close to 100. And we travelled by boat, or we travelled by airplane. We had an airstrip on the mission station.
Q And what type work did Mildred do?
A She was a nurse at that mission station.
Q And what type of dwelling did you live in?
A It was a dwelling, it was open, screened in to protect us from the misquitoes.
Q And did you have children with you?
A Yes, sir.

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Q Both?
A Yes, sir.
Q How old was Gary then; do you remember? 1963.
A I believe that Gary must have been five. And my daughter must have been three years of age.
Q So they grew up somewhat in Suriname.
A Yes, sir.
Q You were there from '63 to when?
A '68.
Q And did you enjoy your missionary work there?
A Yes, sir. My wife and I talked years later that was probably the best time of our life, when we served those people.
Q What type of service did you render to those people?
A We taught those people how to farm. We taught them how to do many different things. Health, she was a nurse to those people. They came for treatment. And we had a day school on the mission station. We had 150 of the native students to come each day for school. We also had some dormitory

students.
Q Who lived there with you?
A Yes. They lived in the dormitories. We had a separate dorm for boys and a separate dorm for girls.
Q Did you observe your wife tending, nursing to these folks? I don't mean every day, but did you from, time to time, observe the type of service your wife performed?
A Yes. There was a lot of the natives would come because of burns, colds, so many people were coming. So my son, Gary, he decided that he would take a check and see how many came in a week's time, and it averaged out, she had about 50 calls each day for a week.
Q And sir, did your wife, to your personal knowledge, ever travel outside of your compound to give service to people?
A Yes. I remember she went one time to a village, it was about two and a half miles away. This lady was about to deliver a newborn baby, turned out she had twins. And when it came time for us to return to the states, I guess it was their custom to offer one of their children to us. Since they had

two, well, they were going to share.
Q And what type work did you do, sir?
A We had a farming program. We had some chickens there, and we also had some small calves. We were trying to teach the natives how they could produce their own livestock and how to raise crops. I took on the challenge the first year I was there, the

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government convinced me that I should try to teach them how to raise a crop of rice. And I never had raised rice in my life, but they came out and we worked with that crop and we had a harvest and it was great.

MR. MOTLEY: May I approach the witness, Your Honor?

THE COURT: Go ahead.

Q Would you tell us, do you recognize those photographs?

A Yes, I do.

Q And do those photographs demonstrate conditions, some conditions under which you lived in Suriname?

A That is true.

MR. MOTLEY: Your Honor, I believe this would be 4 and 5. We offer them into

evidence.

MR. OHLEMEYER: No objection, Your Honor.

THE COURT: 4 and 5 will be admitted.

(Plaintiffs' Exhibit(s) 4 -5 received in evidence.)

Q If you would look at that screen, Mr. Wiley, and when it comes up tell us what that picture No. 4 describes, please.

A That is a group of students at, that was in the dormitory there on the mission compound. And the little girl to the bottom is my daughter, Carla, and Mildred is at the top to the right.

Q What would be the approximate year of that photograph?

A 1963, '64, I would say.

Q Show No. 5, please. What would that describe, please? This is your wife?

A This is my wife. And this lady had just delivered a newborn baby.

Q And had your wife helped with that?

A Yes. She delivered that child.

Q Thank you. Mr. Wiley, while you and your

wife were in Suriname, did you take steps to try to protect yourself from diseases?

A I'm sure we did. Yes.

Q At any time in your presence when your wife was being treated in 1991, did any doctor who was treating her, in your presence, tell you that your wife suffered from some exotic disease that she contracted in Suriname?

MR. WAGNER: Objection, Your Honor. It's hearsay.

MR. MOTLEY: Your Honor, he can state whether the doctor told him something, what he did as a result of it.

MR. WAGNER: You can frame questions in such a way.

THE COURT: Why don't you rephrase that.

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Q Just put it this way, sir: Did you ever receive any information upon which you acted, that is you did something about the information, that your wife suffered from some exotic disease contracted in Suriname?
A No, sir.
Q Now, to your personal knowledge, did your wife have regular physical examinations?

A Yes, sir.
Q And did she have frequent examinations, x-ray examinations?
A Yes, sir.
Q Particularly, did she have breast examinations?
A Yes, sir.
Q To your personal knowledge, has anyone who has lived in your homes ever contracted lung cancer other than your wife?
A No, sir.
Q Now, let us turn, if we might, to the autopsy, okay? The issue of the autopsy of your wife. Can you tell the jury whether or not you participated in the decision to ask for an autopsy of Mildred Wiley?
A Yes, along with my two children.
Q And did you do that before she died or after she died?
A After she died, sir.
Q Did you have the discussion whether to have an autopsy before or after she died?
A After she died.
Q And when you say your children, you mean Carla and Gary?

A Yes, sir.
Q Why did you, what reason was in your mind, in asking -- first of all, who did you ask to conduct -- or who did you go to and say, what medical doctor did you discuss the autopsy with?
MR. WAGNER: Your Honor, that's leading and suggestive.
THE COURT: You can answer.
A Dr. Nicki Turner.
Q And what reason did you have to inquire about an autopsy?
A For my own peace of mind, I wanted to know what was the cause of death.
Q Did you ask for the autopsy in order to bring a lawsuit?
A No, sir.
Q Did you restrict what the pathologist could do in the autopsy; that is, did you say don't look at some part of the body?
A I asked for a restriction because there was going to be an open casket.
Q And what did you ask to be restricted? What part of the body did you ask not to autopsy?
A The head.

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Q Did you restrict in any way the autopsy, any other part of her body, other than her head?
A I don't believe so.
Q Now, Dr. Turner's name has been mentioned often in this courtroom. When did you first meet Dr. Nicki Turner?
A The day that Dr. Scott Walker said he was offered the case and he was going to recommend an internal specialist to my wife. He gave her a choice of six doctors. My wife asked if I was your wife, which one would you choose of the six? He said, Dr. Nicki Turner.
Q And as a result of that information, did you, in fact, ask Dr. Turner to visit with your wife?
A Yes, sir.
Q When you chose Dr. Nicki Turner, was that a joint decision of you and your wife?
A Yes, sir.
Q When you made that decision to choose Dr. Turner, did you choose her because you had in mind bringing a lawsuit?
A No, sir.
Q Would you tell the ladies and gentlemen of

the jury what you recall about the circumstances under which you learned that your wife, Mildred, had lung cancer. How did you find out she had lung cancer?
A Weeks later, after the autopsy, the report came back.
MR. WAGNER: Excuse me, Your Honor. He's going to testify about hearsay.
MR. MOTLEY: I asked him how he received the information, Your Honor. He's not going to tell us what the autopsy said.
MR. WAGNER: I just heard him say a few weeks later he said the autopsy.
THE COURT: You can generally answer that question. He asked you how you received that information.
MR. MOTLEY: Can I rephrase it, Your Honor?
THE COURT: Let me just mention my question.
MR. MOTLEY: Yes, sir.
A I received word by a telephone call.
Q From who? Don't tell us what was said. Who called you?
A Dr. Nicki Turner.

Q All right. Approximately when was that?
A Several weeks. I can't put a time on --
Q How many times in your personal observation did Dr. Turner tend to or administer to or treat your wife? I mean, did she come by once a week or explain it in your own words.
A She came to her room each day from the first of June to the day she died.

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Q Did you observe Dr. Turner's -- you know what I mean when I say administrations or care, the care that she exhibited? I don't want you to tell us what she said, but what did you observe about how Dr. Turner treated your wife as a human being?
A She took a real interest in my wife. She wanted to do all that she could to save her life from death.
Q When Dr. Turner first started treating your wife as a patient, were you present when she asked your wife about her prior medical condition?
A Yes, sir.
Q Did she ask about your wife's prior medical conditions, Dr. Turner?
A Yes, sir.

Q Did she ask in your presence about Mildred's work history?
A Yes, sir.
Q And she did that prior to making a diagnosis in your presence?
A Yes, sir.
Q Now, would it be true that you and Dr. Turner cooked up this lawsuit that brings us in court here today?
MR. WAGNER: Your Honor, I object to the form of the question.
THE COURT: Rephrase that.
Q Is it true that Dr. Turner and you got together and decided to bring this lawsuit?
A No, sir.
Q Are you aware that Dr. Turner was elected Physician of the Year?
A No, sir.
Q Now, from your personal observations, Mr. Wiley, was Mildred a dedicated nurse, from what you observed?
A She was most dedicated to her nursing.
Q Did she try to shirk, from your own observations, shirk or relay work to other people?

A No. That was not her -- that was not her personality, to do something like that.
Q From your personal observations, did she anchor herself to a desk in her office when she became head nurse?
A No, sir.
MR. MOTLEY: Excuse me one second. Would this be 6?
MR. CASSELL: Yes, sir.
MR. MOTLEY: Your Honor, we move to admit Exhibit 6 which are part of the medical records from her operation.
THE COURT: You've examined that.
MR. OHLEMEYER: I have, Your Honor. I have no objection to them going in, but I don't think that's a complete set of the progress notes. That's a portion of the

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medical records. I have no objection to them going in. I assume there will be no objection putting the rest of that record in?

THE COURT: The rest would be subject to being admitted.

MR. WAGNER: No objection on the same condition Mr. Ohlemeyer stated.

THE COURT: 6 will be admitted.

(Plaintiffs' Exhibit(s) 6 received in evidence.)

MR. MOTLEY: We intend to put all the records in. I just want to ask him about this one.

THE COURT: Very good. 6 will be admitted.

Q Now, Mr. Wiley, understandably, the weeks prior to your wife's death was very upsetting to you; correct?

A Yes, sir.

Q Would you describe for the jury the last two or three weeks of her life.

A Last two weeks, two or three weeks of her life, she was in constant pain. She was on a morphine-type pump.

Q What does a pump mean? What does that mean?

A When she was in such pain, she could hand pump in morphine into her body.

Q In other words, she didn't have to wait for a doctor or nurse, she could do it herself.

A Yes. It came to the place that she was in so much pain she would dose off to sleep and she would wake up and she would be in such

terrible pain that I asked Dr. Turner if she would put her on a continuous pump.

Q On the what?

A A continuous pump of morphine. Yes.

Q And to your observation, did, in fact, she go on a continuous pump of morphine?

A Yes, sir.

Q Was there a time when you had to make a tough decision about further treatment for your wife?

A Yes, sir.

Q Would you describe that, please.

A They were continuing to make x-rays. She was -- she had gone down for radium treatments, and they would take her off and on hospital carts down to their radium, radiation room, and she had, I believe she had about nine treatments, or maybe she was to have nine altogether. When it came to the last treatments, she told me, she said, "Phil, I can't go through this any more and please put a stop to it." So I talked to Dr. Turner, I said there would be no more x-rays. There would be no more radiation treatments. From now on, I just want you to

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make her comfortable. And she said she would -- she would do what I asked.
Q How many days after you made that tough decision did your wife pass away, approximately.
A Approximately, five days.
MR. MOTLEY: Your Honor, may I approach?
THE COURT: Go ahead.
Q Mr. Wiley, these are admitted into evidence, and I'm going to show them on the screen, so the jury can see it, okay?
A Okay.
Q Can you see the date here? June 21st?
A Yes, I do.
Q That would be three days prior to your wife's death?
A That is true.
Q Okay. Can you read that first word? Agonal. Can you read the first word?
A Yes.
Q What does that look like to you?
A Looks like agonal. I don't know what that means.
Q Then you see "RESP" effort?

A Yes.
Q Then it says "family" -- do you recognize this handwriting?
A No, sir.
Q Do you see the signature down at the bottom there? Does that look like a "T" to you?
A That looks like a "T".
Q Okay. Family wants to keep comfortable. That's what you told the jury, isn't it?
A Yes.
Q Okay. What do you think that next word says?
A I'm not sure what that means.
Q Okay. Then the next line, the fourth line says, "Given per family request would like autopsy if possible." You see that?
A Yes, sir.
Q Does that refresh your memory that maybe you asked for the autopsy or discussed the autopsy three days before her death?
A I do not recall that.
Q Okay. But you wouldn't dispute the doctor writing that down, would you?
A No, sir.
MR. MOTLEY: Your Honor, I'm trying

to cut through this so I can get done earlier, if you could -- just one second, please.
Q Mr. Wiley, are you aware of any commendations or good reports your wife got as a nurse while she was at the VA Hospital? You personally aware of those?
A Yes, sir.

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Q And have you seen some of the things that were said about your wife as a nurse?
A Yes, sir.
Q And do you recall some of the awards or commendations she received as, I'm talking about as a nurse, while she was at the VA Hospital?
A Yes. From time to time she got service rewards.
Q And what were those?
A For her performance, also she got award for perfect attendance.
Q All right.
MR. MOTLEY: Your Honor, I'm going through the part that I'm going to need to proffer at some point in time, pursuant to Your Honor's ruling, and I'll reserve those

to whenever you tell me to do that.
THE COURT: All right.
Q Are you aware that your wife, in 1991, received a proficiency award that said she was a role model for her staff?
A Yes, sir.
Q That she was highly respected?
A Yes, sir.
Q That she will be remembered with esteem?
A Yes, sir.
Q That she was truly an asset?
A Yes, sir.
Q That her peer and professional staff relationships are excellent?
A Yes.
Q Are you aware, sir, that from her nursing record she literally nursed people back to health?
A Yes, sir.
Q And helped people who had given up on living?
A Yes.
Q Are you aware that, in addition to nursing and nurturing the patients, that she guided and assisted co-employees through personal

problems?
A Yes, sir.
Q Are you aware that she received an award for consistently working with families offering reassurance, guidance and comfort?
A Yes, sir.
Q Do you know anything about the wedding incident at the hospital?
A I remember just a little bit about that.
Q That's okay.
A I don't remember enough to tell you anything.
Q That's fine. We'll ask one of the other nurses.
Would you describe the type of diet that your wife consumed. That is the food she ate. Just describe it in your own

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words.
A We tried to keep away from fat foods, red meat. She was always concerned about my diet, specially, and about her own diet. So I believe that we had a healthy diet. In all of those years.
Q Would it be true that you and your wife did not -- would it be true that you and your

wife did not go out to restaurants because of so much smoking? Is that true or not?
A State that again, please.
Q Okay. If it's claimed that you and your wife were fearful of going into restaurants because people were smoking, would that be true or false?
MR. WAGNER: Your Honor, if it's claimed, I mean, that presupposes --
THE COURT: Why don't you rephrase that, Counselor.
Q Were you and your wife afraid of going into restaurants because there was smoke in the restaurants?
A No, sir.
Q Was your wife active in her church?
A Yes, sir.
Q Did your wife exercise?
A Yes.
Q What kind of exercise?
A We took, every evening we'd take a walk. Take a hike.
Q Did you ride bikes?
A I taught my wife to ride a bicycle.
Q She didn't know when she was growing up?

A Her two brothers had the privilege of having bicycles and her brother thought it wasn't proper for a girl to ride a bicycle. I don't know why.
Q You taught her how to ride it?
A I taught her how to ride a bicycle. And I still have that bicycle today.
Q Was her mother alive, Mrs. Wiley's mother alive when Mildred died?
A Yes, sir.
Q Did she attend your wife's funeral?
A No. She was in a nursing home.
Q And how old was she when she died?
A She was about 92, 93, something.
Q Now, do you know Mildred's birth date?
A It was September the 26th, 1934.
Q And the date of her death.
MR. WAGNER: Excuse me, Counsel. May I stand over here?
THE COURT: Sure.
A The date of her death was June, 24, 1991.
Q So she was actually 56 1/2 years old when she died?
A That is true.
Q I think I may have said yesterday she was

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57, that's just because I can't add and subtract.

A She was going on 57.

MR. MOTLEY: May I ask counsel something?

THE COURT: Go ahead.

(Discussion off the record).

Q Now, this is the tough part, Phil. I'm going to have to ask you some questions about the relationship of you and Mildred, okay? What did you and Mildred like to do together as a couple?

A We liked to take vacations together. We looked forward to the vacation time. And then also, the birthdays of our children. We liked to be with them and so we'd make a trip and we would join them and celebrate their birthday together. Since our children live so far away, well, we'd make a trip out of it.

Q And you have grandchildren?

A Yes. Grandchildren.

Q Now, let me just go back in time to October 1990, okay? Did there come a time when you observed Mildred, any condition of

Mildred that appeared to you to be a lung condition, in October 1990.

MR. WAGNER: Your Honor, there's no foundation laid that this witness could testify about a lung condition.

MR. MOTLEY: Let me rephrase.

MR. WAGNER: I think that's a medical condition.

Q Was she coughing?

A Yes, sir.

Q Anything else you observed about, in October 1990?

A My daughter's birthday is October the 14th, and we made a trip to Pennsylvania so we were together in the car for that distance, and she was doing a lot of coughing and I noticed that it was unusual. It was just outstanding to me that she was coughing so much and she was hoarse in her voice.

Q And after October, did that cough get better, get worse, or stay the same?

A It got worse, not better.

Q Did there come a time when your wife fell at work?

A Yes, sir.

Q Tell the jury about that.

A I believe it was about around March the 9th of '91, they were getting ready for an inspection at the VA and that had to do with accreditation, I believe. And so she was in a shower scrubbing some stands, I believe, and she was in a hurry. She went out of that shower on a new waxed floor and she

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fell right on her buttocks.
Q Now, this is in March of 1991?
A Yes. That is true.
Q She was the head nurse?
A She was the head nurse.
Q And she was doing what?
A She was scrubbing like night stands, I believe.
Q As a result of that injury, did she go to seek any medical treatment, to your personal knowledge?
A She put up with it for a short time and it was suggested by the VA she should get some help.
Q And to your personal knowledge, did she go to the hospital subsequent to that fall?
A She went to Sports Medicine here in Muncie

and she contacted a doctor, Dr. Scott Walker.
Q He was what kind of doctor, to your knowledge?
A He was -- he did back surgery, I believe.
Q And how long did she visit with him? How long did Dr. Walker treat her?
A First of all, they prescribed that she take injections in her back of steroids and morphine, maybe that would relieve some of the pain. I brought her two times to Muncie as an outpatient to Ball Memorial Hospital where they gave her those injections.
Q And what happened next with respect to her treatment?
A She was to take the third treatment, and she came to the doctor and she was in so much pain then, he said I'm going to put you in the hospital. We're not going to -- no longer give the injections.
Q Then what happened?
A She was -- she was admitted into the hospital on May the 29th. She was to have surgery on May the 30th.
Q What kind of surgery, to your knowledge?

A She was to have back surgery on her lower part of her back.
Q On May the 30th?
A May the 30th, I believe.
Q Of 1991.
A 1991.
Q Did she have back surgery?
A No, she did not.
Q To your personal knowledge, what happened to prevent her from having back surgery or what happened next in her treatment?
MR. WAGNER: Your Honor, there's no foundation laid as to this witness being able to testify as to what prevented her from having back surgery. These are all medical opinions that are going to have to come in through the treating physicians and

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not through the hearsay, surmise of a witness without personal knowledge.

MR. MOTLEY: I'll rephrase it.

THE COURT: All right.

Q You know whether she had back surgery or not, don't you?

A She did not have back surgery.

Q You know enough to know she didn't have back

surgery?

A That is true.

Q What did she have?

MR. WAGNER: Your Honor.

Q What medical treatment did she have?

THE COURT: He can answer that. If you know.

A She had cancer.

Q No, sir.

A Okay.

Q Listen to the question. I didn't ask you what the diagnosis was.

THE COURT: That response will go out. The jury will disregard it. He's asking you what you saw, how was she treated that you observed.

A I don't know if I understand the question.

Q Okay.

MR. MOTLEY: Can I try, Judge?

THE COURT: Go ahead.

Q We're asking you -- you said she was scheduled to have back surgery, but she didn't have it, okay. What kind of medical treatment did she next have? Did she have -- was she -- well, did she have

surgery of any kind? Did they look into her lungs or back or what happened next that you observed?

MR. WAGNER: I hate to interrupt. I know this is not good, but there has to be a foundation established here because I'm sure that the witness is going to testify about things that are hearsay and he doesn't have personal knowledge. Seems to me we're in an area now it has to be established he has personal knowledge of things he's talking about as opposed to hearsay.

THE COURT: Well, he testified earlier, Mr. Wagner, he was present with her during her stay during the hospital. He can tell us what he observed as a layman, what medical treatment he observed that was performed upon Mrs. Wiley.

MR. WAGNER: And I have no objection to that, Your Honor.

MR. MOTLEY: That's what we asked.

MR. WAGNER: As to what he observed.

MR. MOTLEY: I thought that's what we asked.

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Q Mr. Wiley, do you understand, I'm asking you what you saw with your own eyes of the treatment after May 30, 1990, the medical treatment.
A Yes.
Q And not whether it was good or bad, but what did they do to her to find out what was wrong?
A Okay, they x-rayed her chest. They put her in an MRI. They did various -- various tests during that period of time trying to find out what her problem was.
Q During this period of time, after May the 30th, did you observe that your wife, whether your wife was in any distress or pain? Did you observe it?
A Yes. She was in great distress.
Q And did she manifest or show you or were you able to observe where most of her pain was coming from?
A All over her body at that time, I believe.
Q Mr. Wiley, I take it on June the 1st, 1991, you didn't know what was wrong with your wife, did you?
A That is true.

Q How did you feel seeing your wife in agony and not knowing what was wrong with her?
A I was in great distress. She came to the hospital. She walked into the hospital, and from that period she just continued to go down.
Q She walked into the hospital. Did she ever walk out of that hospital once she got there?
A No, she did not.
Q When you say she went downhill, what do you mean? What did you observe about her condition on June the 1st until her date of death? Describe it in your own words.
A First few days she had bathroom privileges. After x-rays and the MRI and other tests, they put her -- they told her she had to stay in the bed continuously because of her condition.
Q She couldn't even get out of the bed?
A She could not get out of the bed.
Q After June 1st, did you know, was she able to eat food, solid food, first off, when she was there?
A Yes, sir.

Q Did there come a time when she could not eat solid food?
A Yes, sir.
Q And do you remember approximately when that was? I know we'll have the records, but just approximately.
A No, sir, I do not know.
Q Did she call out to you at all when you were

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in the hospital with her?
A Yes, sir. She wanted me to be by her side as much as possible.
Q And what did you do? From June the 1st until the day she died, how much time did you spend with Mildred Wiley?
A At least eight hours a day, I would stay with her. I also can tell you that they provided a room for me and I would stay overnight. I didn't go home. So I could be with my wife.
Q Mr. Wiley, you can't tell us what you were told, but did there come a point in time when you learned that your wife had cancer and how did you react to that knowledge?
A I was angry. I was in distress. I couldn't believe that this would be possible at all.

Q Why do you say that, sir? Why do you believe -- why did you believe it -- couldn't believe it would be possible that your wife would have cancer?
MR. WAGNER: Your Honor, it's not relevant to any issues in case.
THE COURT: I'll allow it. You can answer.
A State that again, please.
Q You told us you couldn't believe that she had been diagnosed with the cancer. Why did you not believe -- why was it hard for you to believe that your wife had been diagnosed with lung cancer?
A Because she didn't smoke. She was healthy.
Q Prior to her falling in March of 1991, other than the cough that she had, how did she appear physically?
A I'd say she appeared to be okay. No problems.
Q Was your wife conscious, that is, able to talk to you, to know you were there, the last week of her illness?
A Yes, sir.
Q Did there come a time when she was not,

appeared not to be conscious, did not know you were there?
A She was conscious right up to the end. She had a peace about her. She was ready to die. She just committed everything to the Lord.
MR. MOTLEY: Excuse me, Your Honor.
Mr. Wiley, I have no further questions, sir. And thank you, and I'm sure that the other side will have questions for you.
THE WITNESS: Thank you.
MR. MOTLEY: Your Honor, we have agreed to certain things that we'll talk to, Your Honor, about at an appropriate time.
THE COURT: All right. Mr. Wiley, you may step down. When we come back, they will have an opportunity to ask you

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questions if they have any. Thank you.
THE WITNESS: Okay.
THE COURT: Ladies and gentlemen, we'll take a noon break at this point. We will break until 1:00 p.m.
(Standard admonishment)
MR. CROSS: One issue, Your Honor --

THE COURT: While we're all still here, I did have a matter myself. In a pretrial order, I had directed that the plaintiffs mark all their exhibits using numbers. Now, we will give you the stickers. You mark those yourself. Likewise defense. Who will conduct cross-examination?
MR. WAGNER: I will, Your Honor.
THE COURT: For everyone?
MR. WAGNER: Start out.
MR. OHLEMEYER: I may have a couple questions.
THE COURT: Anyone else?
MR. OHLEMEYER: No.
MR. WAGNER: I don't know. I can't speak, but I don't think so.
THE COURT: I see no hands. What else?
MR. CROSS: We have an issue as to --
(Bench discussion)
(A lunch recess was taken.)
THE COURT: Can be seated. All right. The jury back in its entirety.

Along with the three alternates.
Mr. Wagner.
MR. WAGNER: Thank you, Your Honor.
THE COURT: Mr. Wiley.
Tell the jury your name again.
THE WITNESS: Philip Wiley.
THE COURT: And you recognize you're still under oath, sir?
THE WITNESS: Yes, sir.
THE COURT: Mr. Wagner, care to inquire.
MR. WAGNER: Thank you, Your Honor.

CROSS-EXAMINATION
BY MR. WAGNER:

Q Good afternoon, Mr. Wiley.
A Good afternoon.
Q I hope you're settled down a little bit from this morning and had a nice lunch?
A Yes, I did. Thank you.
Q I'd like for you to bear with me for just a little while. I want to kind of take you back and talk a little bit about the places where you and Mrs. Wiley lived and worked for several years. Will you bear with me for a little while while I do that?

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A Yes, sir.
Q You apparently lived in Charlotte, North Carolina; is that true?
A Yes.
Q How long did you live there?
A Five and a half years.
Q Now, you were ordained as a minister in 1955, or '56, was it?
A '56, '57. I'm not too good on dates.
Q Okay. And then after you and Mrs. Wiley were married, as I understand it, you first went to Svenson, Oregon?
A Svenson, Oregon.
Q Where you were a pastor?
A That's right.
Q And that was a small congregation of people, as I recall?
A Seventy-five.
Q And then you went -- let's see. Let me stop for a moment. You were there from September of 1955 until August of 1956, the first time?
A That's right.
Q And then you were a pastor of a church in Janesville, Illinois, from August of 1956

until August of 1957; is that correct?
A That is true.
Q And then you and Mrs. Wiley moved to Frankfort, Indiana, where you went to school for a while?
A That is true.
Q What kind of school was that?
A It was a religious school.
Q All right. Took some additional religious courses?
A That's right.
Q Okay. And then after that you were a pastor of a church in Svenson, Oregon, again?
A Same church.
Q Same church, and that was from August of 1959 to August of 1961, that tour; right?
A That's true.
Q And then next you were a pastor of a church in Eugene, Oregon, from August of 1961 until May of 1962; is that correct?
A That is true.
Q And then you moved back to Muncie for several months because your father passed away?
A That is true.

Q And at that point in time you worked for Morris Supermarkets, for a while?
A In Yorktown, Indiana.
Q In Yorktown making cottage cheese, I believe you told us?
A Yes, that's true.
Q And then you moved to Clinton, Pennsylvania, where you were a pastor of a church from

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January of 1963 until July of 1963; right?
A That is true.
Q Then for the next five years, from 1963 to 1969, you were in Suriname and Guyana?
A That is true.
Q And then after returning from Suriname and Guyana, you returned to the United States and traveled for about a year for the church raising funds?
A Yes, that is true. Lived in Frankfort, Indiana.
Q You say you lived in Frankfort but did you travel around --
A Yes.
Q -- through other cities during that year or so?
A That is true.

Q And did Mrs. Wiley travel with you then?
A No, sir.
Q She was employed at that time?
A That's true.
Q And then after spending about a year or so traveling around and after you returned from Guyana, you got a maintenance job for the Wesleyan Church?
A First of all I worked in the print shop at the Wesleyan Church. Later on I was promoted to director of maintenance.
Q All right. So you were a printer and director of maintenance, then, for how long?
A Twenty years.
Q Twenty years. And was that the Wesleyan Church -- where was that located? Was that in Indianapolis?
A First in Marion, Indiana. The headquarters moved to Indianapolis, Indiana.
Q Did you work out of the Indianapolis office, sir?
A For two years I did. I commuted back and forth.
Q So you also held a job as a carpet installer; is that true?

A That was kind of a hobby I took on, installing carpet.
Q You worked a couple, three evenings every week at that?
A Yes, I did.
Q And that was when, in the 1970s?
A That was in the '70s.
Q And you resigned as the director of maintenance for the church when? 1991, was it?
A I believe it was 1990. I took a job at the Lakeview Wesleyan Church as a maintenance man.
Q Okay. Let's see. Well, you did some, what you call some house-sitting for a while?
A Yes, I did.
Q And so when was that?

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A I moved to Indianapolis. They had -- a Wesleyan Church had a vacant parsonage, and they said if I would house-sit and paint the interior of that house, it would be free of rent.
Q Okay. And you were working at Sam's Club in Fishers, Indiana, at that time?
A That is true.

Q And I believe you also held a job with Sam's Club in Charlotte, North Carolina?
A I transferred from Fishers to Charlotte, North Carolina.
Q Are you still with Sam's Club?
A I am retired at this present time.
Q Retired. Okay. Now, I want to talk about Mrs. Wiley's employment, so we can kind of go back through this for a moment. When you lived in Oregon from September of 1955 to August of 1986, Mrs. Wiley worked as a nurse at the Columbia Hospital in Astoria, Oregon; is that correct?
MR. MOTLEY: Excuse me, Your Honor. I think there's a date switch there. He said '86. I don't think he meant that.
MR. WAGNER: I thank you. I certainly didn't. Let me rephrase.
Q While you lived in Oregon from September of 1955 to August of 1956, Mrs. Wiley worked as a nurse at the Columbia Hospital in Astoria, Oregon; is that true?
A That is true.
Q And did she also work at a Lutheran Hospital there?

A That is true.
Q And when you lived in Janesville, Illinois, from August of 1956 to August of 1957, Mrs. Wiley worked as a nurse in the Memorial Hospital in Mattoon, Illinois?
A That is true.
Q And while you were going to school in Frankfort, which we talked about earlier, from about August of '57 to August of '59, Mrs. Wiley worked at the Frankfort Hospital as a nurse -- excuse me, would that have been the Clinton County Hospital as a nurse?
A That is true, sir.
Q And then when you moved back to Svenson, Oregon, again from August of '59 to August of 1961, Mrs. Wiley again worked as a nurse at the Columbia Hospital, is that so, or would that have been the Lutheran Hospital?
A I believe it was the Lutheran Hospital. I'm not sure about that, but I believe it was Lutheran.
Q And then from August of -- while you were in Eugene, Oregon, from August of 1961 to May '62, Mrs. Wiley worked at Memorial Hospital; is that so?

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A I believe that hospital was called Sacred Heart.
Q Sacred Heart Hospital?
A Yes, sir.
Q And then when you left Eugene, Oregon, and moved to Muncie for a few months, Mrs. Wiley worked at the Ball Memorial Hospital as a nurse.
A That's true.
Q And while you lived in Clinton, Pennsylvania, from January of 1963 to July of 1963, Mrs. Wiley worked as a nurse at the Aliquippa Hospital, northwest of Pittsburgh?
A That's true.
Q And then you went to Suriname and you've already described what you did there for five years; right?
A Yes, sir.
Q Now, when -- I may have already asked you this, but if I did, I apologize, and let me repeat it anyway. After you returned from South America, Suriname and Guyana, Mrs. Wiley worked for the Clinton County Hospital again; is that right?
A Yes, sir.

Q And then from there she went to work for the Davis Clinic in Marion, Indiana?
A That is true.
Q And I believe that was from August of 1969 to about -- excuse me. Rephrase. That was from about October of 1969 to August of 1973 at the Davis Clinic; correct?
A That is true.
Q Now, when -- so Mrs. Wiley had worked almost four years at the Davis Clinic when she left there, and when she left there she went to the Veteran's Administration Hospital; right?
A I believe you're right.
Q Would it be fair to say, Mr. Wiley, that Mrs. Wiley never had a problem of getting a job as a nurse? Nurses were pretty much in demand back in those days, weren't they?
A That is true.
Q And when Mrs. Wiley left the Davis Clinic, it was really her decision to leave, she had a good job there and she could have continued there? It was her decision to leave?
A That is true.

Q And she could have worked there when she left the Davis Clinic, isn't it so, Mr. Wiley, at Ball Memorial Hospital or the Clinton Hospital we talked about or the Marion General Hospital?
A Rephrase your question again.
Q Sure. She had a number of choices when she left the Davis Clinic. If she wanted to

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work at some hospital, she could have worked at some of the hospitals she worked at before, Ball Memorial or Clinton County or Frankfort, couldn't she?

A She could have.

Q When you returned from South America in 1968, I believe you and Mrs. Wiley lived in mobile homes for a while; is that so?

A Yes, sir.

Q How many years did you live in mobile homes after 1968 when you returned from Suriname and Guyana?

A One year on the west side of Marion. I believe it was on Miller Avenue for one year we lived in that location.

Q Then after that did you also continue to live in mobile homes?

A Yes. We moved then to Marion on the southwest part at Sicily Trailer Court.

Q Which is in the southwest part of Marion, Indiana?

A It's more south than west, I would say.

Q And then you moved to a house on West 10th Street in Jonesboro, Indiana; right?

A Yes.

Q And what year was that that you moved to that house?

A I want to say about '74, '75. I'm not sure about that date.

Q All right, sir. Someplace about 1974, 1975?

A I think so.

Q Give or take a year or so.

A Yes.

Q In that house on Jonesboro, you had a wood burning fireplace; is that correct?

A When we moved in there, it had a fireplace, and we put one of those fireplace inserts in, but we didn't use it -- we used it very little because my wife didn't like the dirt and dust, didn't like for me to be carrying the firewood into the living room. So we had it taken out.

Q Let me ask you some questions now about Suriname and Guyana for a moment. You were there July of 1963 to July of 1968?

A That is true.

Q And the mission where you were was actually in the jungle and there were no roads. You had to use the river for transportation.

A That is true.

Q The house that you lived in there, was that a house that was built up on stilts, as I remember; is that right?

A That is true.

Q What kind of roof did it have?

A The Dutch name for it is dock plat.

Q Dock plat?

A Yes.

Q And who all lived in that house?

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A Just the Wiley family.
Q That was you and Mrs. Wiley and your children?
A That is true.
Q Now, were your children at the mission all the time?
A My wife taught them around the kitchen table. It was home schooling in the early

days.
Q Didn't your children attend boarding school?
A Yes, for one year they went into the capital city of Parimarible to a boarding school to prepare them for state-side education.
Q So they weren't at the mission the entire time?
A That's true.
Q What year was that that they went into the boarding school?
A It must have been the fall of '67.
Q Now, this mission had a medical facility, and was that a government-owned medical facility?
A Yes, it was.
Q What government owned it, the country of Suriname?
A Yes, sir.
Q What kind of medical facility was it? That's a bad question. Could you describe for us a little bit what that medical facility looked like and what it did and that sort of thing?
A It was a free-standing clinic. The government doctor would come once a week on

Saturday, and sometimes he would ask my wife for assistance.
Q Did they treat all kinds of patients there?
A Yes, sir.
Q And I think you told us that it was sort of rainy and hot; is that right?
A That is true.
Q What did you use to cook with?
A Propane gas.
Q Bottled gas?
A Bottled gas.
Q And how was that brought in?
A Up the river by boat.
Q And I believe you had a washing machine that was powered by gasoline to do laundry?
A That is true.
Q Mrs. Wiley did the laundry?
A Yes, sir.
Q Did she also do the filling of the gasoline and all that sort of thing in the washing machine?
A That was my duties.
Q That was one of your duties?
A Yes, sir.
Q You had to carry the gas?

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A Yes, sir.
Q I believe also from time to time your family would eat wild meat that the local people would bring in?
A That's true.
Q And did you fish in the river from time to time and catch fish?
A No, sir.
Q I read that in another deposition. I thought maybe -- oh, well, never mind.
They didn't have any plumbing there either, I take it; right?
A That is true.
Q So the toilet facilities and everything were all outside?
A That is true.
Q And you had a refrigerator that was powered by kerosene; is that right?
A That is true.
Q Was your refrigerator in your home?
A That is true.
Q And rainwater there, you caught and boiled it?
A That is true.
Q That's what you had to do to get drinking

water; right?
A That is true.
Q I think you've already touched on this a little bit but you raised some chickens and cattle for butchering and eating; is that right?
A That's true.
Q The native people that lived there, did they live in the surrounding jungles, in villages?
A Yes, in villages, yes.
Q And how far were those from the mission? Were there several villages, more than one?
A The closest one was about a half mile. And then there was other villages up and down the river.
Q And the natives cooked over open fires; correct?
A Yes, sir.
Q And I believe you told us that Mrs. Wiley would visit their residences every once in a while?
A From time to time. That's true.
Q Let me ask you about Guyana. I believe that you went to Guyana at the end of your tour

in Suriname; is that true?
A That is true.
Q And where did you go in Guyana?
A We went to an Indian village, Parimakitoi, 185 miles south of Georgetown, Guyana.
Q Was that another Indian village that was in the jungle?
A Yes, sir.

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Q And where did you live there? I mean, excuse me. Let me withdraw the question. What kind of living facilities did you have there?
A More modern houses than we had in Suriname.
Q But were they basically the same kind of conditions, no running water, no plumbing and that sort of thing?
A That is true.
Q You had to do more or less the same kind of things you did in Suriname, boil the water, catch the water?
A Yes, sir.
Q Raise your own food, cattle I'm talking about and chickens and things?
A No cattle.
Q Didn't have any cattle?

A Our meat and produce would come from the capitol city.
Q Did Mrs. Wiley also perform nursing services there for the local people?
A Yes, she did.
Q While you were in Suriname, did you have any medical problems?
A One time for about a month I had problem digesting my food.
Q You had some sort of an intestinal disease that you had to return to the United States for, didn't you, Mr. Wiley?
A Yes, that's right.
Q Weren't you back here in the United States for about two months with that?
A I believe so.
Q Let me ask you a few questions now, turn to a little different subject, Mr. Wiley. You have a brother named Don Wiley that has a 300-acre dairy farm?
A That was in the past. He is retired now.
Q Did have it in the past?
A That's right.
Q And from time to time you and Mrs. Wiley would go there and spend some time?

A Just one day at a time.
Q Usually, do you remember telling us you went there about five times each year?
A I would say so. Maybe less.
Q And you told us you had another brother, Charles, who has passed away?
A That is true.
Q And his wife was named Arlene?
A That is right.
Q And you and Mrs. Wiley would go to visit her from time to time?
A That is true.
Q Where did she live?
A When we were in Suriname, she was there for two years in another missionary house on the same patient station.
Q My question was really when she was back in

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the United States and you went to visit her, where did she live?
A She lived in Kernersville, North Carolina.
Q She still lives there?
A No. She's passed away.
Q Oh, she's passed away?
A Yes.
Q Now, Mrs. Wiley, while she was working at

the Veteran's Administration got 26 working days of vacation; correct?
A I believe that is -- that's close to what she received.
Q And that would have been slightly over five work weeks?
A That is true.
Q And you and Mrs. Wiley took vacations together?
A Yes, we did.
Q You went camping places like state parks down in Tennessee?
A Yes, we did.
Q And you've also traveled together to the Philippines and stayed a couple weeks?
A That's true.
Q And been to Japan and Korea?
A Our trip to Japan was three hours, and the trip to Korea was just to trade, change planes at the airport.
Q You also traveled to Costa Rica?
A Yes, sir.
Q Was that to see your son --
A Yes.
Q -- at that time. And in connection with

that trip you went to Panama also for a while?
A Just to change planes at the airport.
Q And you and Mrs. Wiley have also been to Peru at least a couple times?
A Yes, sir.
Q Before I forget it, because I don't think you've been asked this. Mrs. Wiley was actually born in Hong Kong in 1934; is that right?
A That is true.
Q Her mother and father were also missionaries; right?
A That is right.
Q Besides the places we've already talked about, where else did you and Mrs. Wiley go to on vacations?
A One year we went to Canada; one year we went to Grand Canyon, California; one year we went to Mississippi, Alabama; and we had shorter vacations too.
Q Where would you go on your shorter vacations?
A We took a vacation to go see our daughter in Pennsylvania. I don't recall any more of

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those shorter vacations.
Q You mentioned that you were in Mississippi; is that right?
A That is true.
Q Was that in Biloxi, Mississippi?
A That is true.
Q Now, I want to talk about some of your testimony about Mrs. Wiley's work at the Veteran's Administration Hospital, and counsel for the plaintiff asked you some questions about your observations there. Do you remember that?
A Yes, sir.
Q Actually, you visited the Veteran's Administration Hospital while your wife worked there no more than six or eight times each year; isn't that true?
A Sometimes in the wintertime it might have been more than that because of winter conditions.
Q Do you remember telling us that in your deposition, that --
A No, I don't. It just comes to my mind now.
Q Well, is it accurate, sir, that you visited Mrs. Wiley while she worked at the Veteran's

Hospital no more than six or eight times a year?
A I told you that in the deposition.
Q Yes, sir.
A Yes.
Q So that was accurate when you told us that?
A Yes.
Q And typically your visits there only lasted 30 minutes, didn't they, Mr. Wiley?
A Yes, sir.
Q Whenever you visited Mrs. Wiley at the Veteran's Hospital, you never saw your wife in the day room, did you?
A Restate that again, please.
Q On your visits, all the visits that you made to Mrs. Wiley at the Veteran's Administration Hospital, you never saw your wife in the day room; isn't that correct?
A I can't say for sure about that.
Q Let me see if I can refresh your recollection.
A Okay.
Q On your deposition, Volume 1, pages 25 and 26, question at line 22 you were asked this question, Mr. Wiley, about your visits to

the hospital, and the question was, "What about the day room when you saw people in the day room, was your wife in the day room?" And you said, "No, I had to pass the day room to get to my wife's office."
Do you remember that?
A Yes.
Q So you never saw your wife in the day room

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on these short visits that you would make; right?
A She wasn't in the day room, but she was at the nursing station just across from the day room.
Q And, sir, you recall that at some point the Veteran's Hospital instituted a no smoking policy in the entire building?
A Yes. I remember that.
Q Now, you remember seeing the nurses' break room?
A Yes, sir.
Q And the nurses' break room had four or five windows and a couple of doors, didn't it?
A Yes, sir.
Q And your wife had a private office.
A Yes, sir.

Q And in her private office she had an air-conditioner.
A Yes, sir.
Q And from your observations and your brief visits to that hospital, you sometimes saw construction work going on?
A Yes, there was a few times.
Q And you saw new windows being installed in buildings.
A Yes, sir.
Q You saw the ceiling was being lowered and other construction projects done.
A Yes, sir.
Q Now, Mrs. Wiley was the head nurse in Building 16 from 1985 on; is that so?
A I'm not sure about that date.
Q Let me see if I can --
A Maybe you can help me out on that.
Q I'll try. Believe me, sir, I know it's hard to remember some of the things we asked you about at your deposition. But I'll just try to refresh your recollection for a moment.
At page 153 of Volume 2, "Question: From 1985 on your wife was a head nurse in Building 16; is that correct, sir?

"Answer: Yes, sir."
Was that the answer you gave?
A Yes, sir.
Q Does that refresh your recollection, Mr. Wiley?
A Yes, sir.
Q Thank you. And prior to becoming a head nurse, Mrs. Wiley was actually the acting head nurse who filled in from time to time for the head nurse when she was off; correct?
A That is true.
Q And the patients on the first floor -- let me back up for a moment. Mrs. Wiley, from your own observations, primarily worked on the first floor of Building 16 at the Veteran's Administration Hospital; correct?

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A That was her primary floor, but she also worked on the second floor.
Q Now, the patients on the first floor were total care patients?
A That is true.
Q We're talking about the patients on the first floor of Building 16 where she primarily worked; correct?

A That is true.
Q As the head nurse, when your wife became the head nurse, she had more administrative duties than she did as a staff nurse like paperwork and that sort of thing, didn't she?
A Yes, sir.
Q And for many years Mrs. Wiley worked at the Veteran's Administration Hospital on the midnight to morning shift, didn't she?
A She did that for a period of time, I believe.
Q Well, is it a fact that she worked on that shift about 25 percent of the entire time she worked at the Veteran's Administration Hospital?
A That could be. I'm not sure.
Q Well, again let me try to refresh your recollection. Page 150 to 151 of Volume 2. Question at line 15, "8 a.m. to 4:30 shift, you have described to me, was that always your wife's shift when she worked at the Veteran's Administration? You said there were a few years she worked the night relief. What would that shift entail?"

You answered, "It would be more of a duty nurse than a nurse in charge."
And then on the next page where we were talking about that, we said, "What percentage of the time that your wife worked at the Veteran's Administration Hospital did she do the night shift or the night detail?
"Answer: Very small percent.
"Would it be a quarter, 25 percent?
Answer: That would be a good -- a reasonable approximation, yes.
A Yes. Thank you.
MR. HOWARD: Your Honor, I think he's misread the deposition. That was not his response.
MR. WAGNER: Part of it was a question. Mr. Howard is correct. If you want me to, I can do it again, but I think the thrust of it is exactly the same.
Q In any event, it comports with your recollection; is that right?
MR. HOWARD: No. Your Honor, he read as though the answer was "that would be a good a reasonable approximation, yes." And that is not the deposition testimony.

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MR. WAGNER: I'll read it exactly as it is.
MR. MOTLEY: Your Honor, may I ask that the witness, when counsel represents something in his deposition, that he be allowed the opportunity to look at it?
THE COURT: He can look at it if he likes.
MR. WAGNER: I will be more than happy to do this. I'll do this one. I'll read the question and answer very carefully the way it is in the transcript.

Q "What percentage of the time that your wife worked at the Veteran's Administration Hospital did she do the night shift or the night detail?
"Answer: Very small percent.
"Question: Would it be a quarter, 25 percent?
"Answer: That would be a good --
"Question: A reasonable approximation?
"Answer: Yes."
MR. WAGNER: Did I read that right, Counsel?
MR. HOWARD: Yes, that time you

did.

Q So your recollection is that you worked --
A Let that stand as the written.
Q Thank you.
And when she worked days, she worked from Monday through Friday, 8:00 a.m. to about 4:30 p.m.; is that correct?
A That is true.
Q And she got about a half hour lunch period every day?
A Yes, sir.
Q And she had breaks in the morning and the afternoon?
A Yes, sir.
Q And your wife got several paid holidays every year; is that so?
A Yes, sir.
Q And is it accurate, Mr. Wiley, that Mrs. Wiley attended nursing workshops from time to time?
A That is true.
Q And many of those were in other towns and cities; isn't that so?
A Yes, that's true.
Q She, for example, attended workshops in

Danville, Illinois, and Ball State University?
A That is true.
Q And she attended those during the entire time she was a nurse at the Veteran's Administration Hospital?
A Especially after she became head nurse.
Q But she did that before she became head

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nurse too, didn't she?
A Yes, that's right.
Q And some of those lasted one or two days?
A Sometimes overnight.
Q We mentioned this earlier, but the section of the Veteran's Administration Hospital where Mrs. Wiley worked housed total care patients, I think as we already said; right?
A That is true.
Q And a total care patient is one who is in bed all the time and requires constant care and tube feeding?
A That is true.
Q And some of those patients that you observed there were in comas?
A Yes. That's true.
Q Some needed oxygen?

A True.
Q And there were times, Mr. Wiley, when your wife had a staff of 24 people?
A That is true.
Q And Mrs. Wiley always looked forward to going to work, didn't she?
A That's -- that is true.
Q You don't know of any time when Mrs. Wiley requested to be transferred to a different job or a different building at the Veteran's Administration Hospital; is that true?
A That is true.
Q You were asked some questions about some commendations and (inaudible) on Mrs. Wiley.
Did you know that your wife served also as the building safety coordinator?
A Yes, I did.
Q Did you know that she also served on the audit committee?
A No, I didn't recall that.
Q Do you know that your wife served on the Nurse Professional Standards Board?
A I believe I recall.
Q Did you know that Mrs. Wiley was the fire and safety coordinator?

A I'm not sure about that.
Q Okay, sir. Did you know that your wife was a member of something called NOVA, N-O-V-A, at the hospital?
A I've heard of that.
Q Did you know that your wife was on the Licensed Practical Nurse Standards Board?
A No, I didn't know that.
Q Did you know that Mrs. Wiley was on the Nursing Procedures Committee?
A I'm not sure about that. I'm sorry.
Q Did you have any knowledge that Mrs. Wiley was a chairperson for something called the Inter-rater Reliability Group?
A No, I don't.
Q I'm getting some of these off of the records of Mrs. Wiley, and you're not entirely

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familiar with those?
A They're new to me.
Q Fair enough.
You mentioned that Mrs. Wiley, for want of a better term, home schooled your children while you were in South America for a while?
A That's true.

Q Did she also do that here in the United States?
A No, sir.
Q Just in South America?
A That's true.
Q Would you describe Mrs. Wiley as a person who could accomplish things she set her mind to?
A That is true.
Q And she wasn't afraid to speak up and tell people what she thought, was she?
A She wasn't afraid to give orders.
Q And she wasn't afraid to speak up and tell people what she thought?
A That's true.
Q And Mrs. Wiley read books about health.
A I'm sure she did.
Q She read the newspapers.
A Yes, sir.
Q Read the Indianapolis Star throughout most of your marriage.
A That's right.
Q Read Newsweek Magazine.
A Yes.
Q She subscribed to and read nursing

magazines.
A She did.
Q Read Reader's Digest.
A Yes, sir.
Q And Mrs. Wiley, from your observations, was aware of advances in sciences -- rephrase. Mrs. Wiley, to your knowledge, was aware of advances in science and medicine; would that be correct?
A I don't know how to answer that.
Q Well, let me see if I can rephrase it.
From your observations and what you saw and what your wife read, isn't it a fact, Mr. Wiley, that Mrs. Wiley was aware of advances in medicine?
A Yes, sir.
Q And from those same observations, isn't it a fact that Mrs. Wiley was aware of advances in science?
A Yes, sir.
Q And one of the reasons that Mrs. Wiley went to workshops was that she was interested in advancing her education as a nurse; isn't that correct?
A That is true.

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Q Mrs. Wiley did not like being exposed to cigarette smoke; right?
A Probably because of religious principles.
Q Well, she didn't -- for whatever reasons, she didn't like being around it, did she?
A That's true.
Q And all your married life with Mrs. Wiley, she never liked to be around people who were smoking or cigarette smoke; right?
A It was kind of an aggravation to her.
THE COURT: Speak up just a little bit, Mr. Wiley.
THE WITNESS: Okay.
THE COURT: Thank you.
Q In fact, didn't she tell you that cigarette smoke aggravated her sinus drainage and her allergies?
A That is true.
Q Now, you in direct examination by Mr. Motley, he asked you some questions about Mrs. Wiley's health prior to 1991, and I think you said, in general, she had pretty good health; right?
A I believe so.
Q When you were in Biloxi, Mississippi, that

was in July of 1986; is that correct?
A I believe you're correct.
Q And do you recall, Mr. Wiley, that while you were in Biloxi, Mississippi, that Mrs. Wiley had to go to the Gulf Coast Community Hospital?
A That is true.
Q And at that time she was suffering from chest congestion and non-productive cough?
A That is true.
Q And, in fact, you were with her at that time?
A I was with her, that is true.
Q And do you recall she was diagnosed at that time with possibly early pneumonia?
A That is true.
Q Let me show you --
MR. WAGNER: May I approach the witness, Your Honor?
THE COURT: Yes.
Q Let me show you what I've had marked for identification as Defendant's Exhibit P1735A. You've seen that document before, Mr. Wiley?
A I don't recall.

Q Take a minute and look at it. Do you recognize it, sir, as a document that is in -- in Mrs. Wiley's handwriting, and it's a Furlough Arrival Health History that she filled out when you returned from Suriname and Guyana?
A Yes, I do.
MR. WAGNER: Your Honor, we'd offer

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into evidence Defendant's Exhibit P1735A.
THE COURT: Any objection, Mr. Motley?
MR. MOTLEY: None, Your Honor. No objection.
THE COURT: All right. Exhibit P1735A will be admitted.
(Defendants' Exhibit(s) P1735A received in evidence.)
MR. WAGNER: Your Honor, I have extra copies that I would like to pass to the jury, if I may?
THE COURT: Bailiff will pass those.
MR. WAGNER: Thank you.

Q Would this have been the kind of form that people like yourselves, you and Mrs. Wiley,

when you returned from a foreign tour as missionaries you would have to fill out for the Wesleyan Church when you got back?

A We had to take a physical. Excuse me. We had to take a physical when we returned.

Q And so this would have been something that was done in connection with that physical examination when Mrs. Wiley returned?

A Yes, sir.

Q Okay. If you'll look with me, please, on the second page, and do you see that the paragraphs there are lettered? Do you see that?

A Yes.

Q And there is a paragraph K. Do you see that?

A K. Yes.

Q And do you see that Mrs. Wiley circled rectal bleeding?

A Yes. I see that.

Q Did she have rectal bleeding, as you recall, in Suriname and Guyana?

A I didn't know that.

Q That's not something you recall?

A That's true.

Q She had it when she came back; do you recall that?

A No, I don't.

Q If you look down at paragraph N, about right in the middle there, she also circled dizziness. Do you remember your wife suffering from time to time with dizzy spells?

A If that's true, she didn't tell me about it.

Q All right. And if you would look at paragraph O, the next paragraph down, she circled that she had blood in her urine from time to time. Do you see that?

A Yes.

Q Did you ever discuss that with her?

A No, sir.

Q I think she wrote there, if I can read her

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writing, it says on two occasions in the past year; right?
A Yes, sir.
Q And then if we look down on the last line of O, paragraph O there, you see the word breast?
A Yes.
Q And on that line it says treated for lump in

October of 1967. Do you see that?
A Yes.
Q And where was she treated?
A I'm not sure about that, but I understood at that time the lump went away. Just a short --
Q I'm sorry, did you finish your answer?
A Yes.
Q Do you know where she was treated?
A No, I don't.
Q You weren't with her then when she was treated?
A Evidently not.
Q And whatever treatment she received, she got while she was in Suriname?
A Evidently.
Q And then in R, kind of right there in the middle, do you see the word beverages?
A Yes, sir.
Q It says she drank six to eight cups of coffee daily?
A That's a possibility.
Q Was that a life-long habit of hers?
A No, sir.
Q Mrs. Wiley had a bone scan done at Marion

General Hospital in October of 1984, didn't she?
A Yes, sir.
Q Did you go with her?
A No, sir, I don't believe so.
Q So on that occasion she went to the hospital to have a bone scan and you didn't -- you weren't with her so you didn't see what happened?
A No, sir.
Q Do you know why that bone scan was done?
A I don't recall, sir.
Q You didn't talk to the doctor?
A No, sir.
Q Now, you mentioned that your wife had a fall in March of 1991 at the Veteran's Hospital?
A That is true.
Q And she had some back problems as a result of that?
A That is true.
Q But actually she had back pain before March of 1991, didn't she?
A She had back discomfort from lifting patients.
Q Well, I didn't ask you why, but I mean, she

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did have back pain long before March of 1991, didn't she?
A Yes. That is true.
Q And you gave a description as to how her fall occurred in March of 1991, but am I correct, you weren't there when she fell?
A No, sir.
Q What you know is what somebody else told you?
A That's what she told me.
Q And in February of 1985, wasn't Mrs. Wiley admitted to Marion General Hospital emergency room because she was having difficulty breathing and numbness?
A I believe so.
Q And do you recall that in February of 1989 Mrs. Wiley had what's called a sigmoidoscopy, a procedure to explore her colon?
A I recall that.
Q Were you with her on that occasion?
A No, sir.
Q Do you remember that that was done at the Marion General Hospital?
A Yes, sir.

Q Do you remember what symptoms and problems she was having that prompted her to go have that procedure done?
A No. No, sir.
Q Do you remember that Mrs. Wiley had a physical examination in June of 1987?
A I don't recall.
Q Let me see if I can refresh your recollection.
I'm going to show you what's been marked for identification as Defendants' M1685A. Take a minute to look at that. You don't need to read it word for word, but I want you to just generally familiarize yourself with it, Mr. Wiley.
A Okay.
Q Have you done that? Do you recognize that as a document that discloses information about the physical examination that Mrs. Wiley had in June 1987 on a form called CH CompuHealth?
A Yes, sir.
MR. WAGNER: Your Honor, we'd offer into evidence Defendants' Exhibit M1685A.
MR. MOTLEY: No objection, Your

Honor.
THE COURT: Thank you, Counselor. M1685A may be admitted.
(Defendants' Exhibit(s) M1685A received in evidence.)
MR. WAGNER: Your Honor, may I pass copies to the jury through Mr. Cassell?
THE COURT: You may.

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Q All right. Would it be accurate, Mr. Wiley, that in June of 1987 that one of Mrs. Wiley's doctors was a Dr. Roggli?
A That is true.
Q And he was in, looks like from this document, Gas City, Indiana; right?
A That is true.
Q Now, on the first page this document has at the top CH CompuHealth. I believe I'm reading that right. It looks like a CH. And it gives an address in Atlanta, Georgia. Do you see that?
A I do.
Q Did Mrs. Wiley go to Atlanta, Georgia, to have this done?
A No, sir.
Q Probably the information was sent there to

be computerized?
A Yes, sir.
Q You've already answered this. You don't remember discussing this report from CH CompuHealth with her; right?
A No, sir.
Q Now, on page 2, numbered page 2, I should say in the upper right-hand corner, there is some information there about weight and height. Shows that Mrs. Wiley at that time weighed 134 pounds. Would that be approximately correct, to your recollection?
A Yes, sir.
Q And if you turn over to page 4, there is, it's called, something there called a chem screen. Do you see that?
A Yes.
Q It shows that she had a chest rale of 277, and that's got a couple of asterisks before it. And if you look down at the bottom of the page it says value outside of reference range. So that means that she had a high chest rale; right?
A Evidently.
Q And was that a condition that she had most

of her life?
A I do not know.
Q And then if we turn to page 6, page numbered 6, that was dated, again, in June of 1987, wasn't it? So if we look at page 6, there is a section there called major illnesses and conditions. Do you see that?
A Yes.
Q And it says "During the past five years, she has had pneumonia." Do you recall your wife had pneumonia in the past five years before June of 1986?
A I know she was sick one time. I don't recall if it was pneumonia. It could have been.
Q Okay. And it says there also in that same section that during the past five years

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she's had stomach pain, relief by antacids and has had painful urination. Do you see that?

A Yes.

Q Do you know what was causing her painful urination?

A I recall a bladder infection. That's all I know.

Q And it also indicates there that she bruised easily or has bleeding tendencies. Do you see that? Did she have bleeding tendencies?

A I don't recall bleeding tendencies.

Q Do you recall, Mr. Wiley, that Mrs. Wiley went to a doctor in connection with her allergies in April of 1991?

A Yes, sir.

Q Let me show you what I have marked for identification as Defendants' Exhibit M1694A.

MR. OHLEMEYER: Mr. Wagner. A or H?

MR. WAGNER: M1694A.

THE COURT: We'll see if we can get that stopped.

Q Have you had a chance to familiarize yourself with that document, Mr. Wiley?

A Yes, sir.

Q You've seen that before, haven't you? That was shown to you at your deposition. Do you remember that?

A It seems so.

Q And do you recognize that as an allergy history that's filled out in Mrs. Wiley's

handwriting?

A Yes, sir.

MR. WAGNER: Your Honor, we would offer into evidence Defendants' Exhibit M1694A.

MR. MOTLEY: No objection.

THE COURT: Thank you. M1694A will be admitted.

(Defendants' Exhibit(s) M1694A received in evidence.)

MR. WAGNER: May I have copies passed to the jury? Mr. Cassell left.

THE COURT: Go ahead, Counsel.

MR. WAGNER: Can I do it?

Q This exhibit which is entitled "Allergy History" was something that Mrs. Wiley made out when she went to see the doctor for her allergy problems; is that right?

A Yes.

Q And in the upper right-hand corner on the first page it's dated April 17, 1991, isn't it?

A That is true.

Q And that was just shortly before she went into Ball Memorial Hospital during her last

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illness; right?
A That is true.
Q And it indicates, I believe -- let's see. Let me do it this way. There are three columns on the first page, right?
A Yes, sir.
Q If we look at the third column on the right, in the second block from the bottom there is a question there in the bottom of that block which says, "What are you allergic to?" Do you see that?
A Yes, sir.
Q It says "tobacco smoke"; correct?
A Yes, I see that.
Q And that's in Mrs. Wiley's handwriting; right?
A Evidently.
Q Did you discuss with her the fact that she thought she was allergic to tobacco smoke?
A I just knew that she was -- it irritated her, irritated her sinuses. That's all --
THE COURT: Speak up just a little bit.
A It irritated her sinuses.
Q If we look at the first column on the left,

Mr. Wiley, do you see there are -- there's some blocks there at the top that says, "Yes, No, and Don't know."
A Yes.
Q And do you see the third block there from the top it says, starts out with, "Have trouble with your throat," and then right underneath that it says, "Frequently sore drainage."
A Yes.
Q And she checked yes; right?
A Yes.
Q So was she having frequent sore drainage with her throat at that time, if you recall?
A Evidently.
Q And in the next block down she checked every one of the items that indicated she was having a lot of trouble with her eyes -- redness, itching, tearing, puffiness; right?
A Yes, that's true.
Q Did you discuss that with her at that time?
A I didn't discuss with her. I just evidently knew that this was a condition.
Q And in the next block down it says, "Had trouble with your nose." Do you see that?

A Yes, sir.
Q And she checked yes for clear colorless discharge; right?
A Yes, sir.
Q She checked yes for -- a little farther down for sneezing.
A Yes.
Q Do you see that?

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A Yes.
Q And then do you see in the middle block there it has at the top, "Which of the following do you think cause your symptoms or make them worse?"
A Yes.
Q And in the block that says "indoors," she said "Don't know." Right?
A Yes.
Q Block that says "outdoors," she said "Yes"; right?
A Yes.
Q And in the blocks that say "at home" and "at work" she said, "Don't know"; right?
A Yes.
Q And then on the second page in the middle column in the -- it's hard for me to tell

exactly what this is, but if you look down about a third from the bottom there it says, "Do you think your occupation has anything to do with your symptoms?" Do you see that?
A Yes.
Q And what did Mrs. Wiley write there?
A She checked the no box.
Q No. She wrote something after that question, didn't she? She said, "Don't know"; didn't she?
A Yes, that's right.
Q And then in the last block in that middle column there is a question that says, "At work are your symptoms better?" And she checked the same under the yes column; right?
A Yes, sir.
Q And in that right-hand column on that same page there's, right in the middle of the page it says, "Do you have an air-conditioner?" Then it says, "At work, at home, in bedroom, central." She checked yes for all those; right?
A Yes, sir.
Q And then down at the bottom of the page

there's some handwritten material there right under the middle column. Do you see that?
A Yes, sir.
Q And in the left-hand column where she's written out some things, she wrote, "Coffee, four cups per day"; right?
A Yes, sir.
Q So she was still drinking a fair amount of coffee in April 1991; right?
A Yes, sir.
Q And then in the right-hand column it's got beef and pork three and four. That would indicate three or four times a week she ate beef and pork; right?
A I'm not sure about that.
Q Do you know any other way to interpret that?

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A No, I don't.
Q Mrs. Wiley, while she worked at the Veteran's Administration Hospital, had an annual physical examination every year, didn't she, Mr. Wiley?
A Yes, sir.
Q That was something that the hospital did for their employees, including nurses? Let me

rephrase it.
The physical examination that Mrs. Wiley had every year was a physical examination that she obtained through her employment at the Veteran's Administration Hospital; correct?
A I believe it was required.
Q And in connection with that physical examination, Mrs. Wiley had chest X-rays; correct?
A That is true.
Q Did you ever obtain the results of Mrs. Wiley's physical examination and chest X-rays at the Veteran's Administration Hospital?
A No, sir.
Q You told counsel this morning in answer to questions about things that you thought you smelled on her clothes that smelled like cigarette smoke?
A That is true.
Q Isn't it true, Mr. Wiley, that in the 17 years that Mrs. Wiley worked at the Veteran's Administration Hospital, you can only recall her complaining about smoke on

her clothes five or six times during that entire period of time she worked there?
A No, sir.
Q I show you page 44 of Volume 2, line 13. Do you see line 13 there, Mr. Wiley, where my thumb is?
A Yes, sir.
Q Could you read the question and answer?
A "How many times did she complain to you about the smell of her clothes?"
I answered, "Five or six times. I don't know."
Q Thank you. Was that answer accurate, Mr. Wiley, when you gave it to us?
A Yes. Like I said, I don't know.
Q Is it accurate, turning now to a little different subject, Mr. Wiley, is it accurate that when you and Mrs. Wiley met with Dr. Turner after you were referred to her, that that was the first time that Dr. Turner had ever seen Mrs. Wiley?
A That is true.
Q Dr. Turner had never treated Mrs. Wiley for anything prior to that?
A No.

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Q With respect to the autopsy that was performed after Mrs. Wiley's death?
A Yes, sir.
Q Who paid for that autopsy?
A I'm not sure.
Q You're sure you didn't?
A I'm not sure. I might have.
Q Now, Mr. Motley asked you some questions about the restrictions that were put on the autopsy. Do you remember that?
A Yes, sir.
Q And you told him, if I recall, if I recounted your testimony, you correct me if I'm wrong, you recalled that you, since it was your choice as to whether or not the autopsy should be performed and how it should be performed, that you restricted only -- let me rephrase the question.
That it was your wish and it was your direction that the autopsy not be performed on the head.
A That is true, because of open casket viewing.
Q And didn't you, in fact, though, Mr. Wiley tell Dr. Turner that you wanted the autopsy

restricted to the lungs and the lower back?
A I'm not sure about that. Can you help me out?
Q I'll do my best. Volume 1 of your deposition, Mr. Wiley. That was taken on July 19, 1994. And I think just the question on page 30 at line 18, begins at line 18. It's kind of highlighted, Mr. Wiley. Could you read that for me?
A Line 18, "Were restrictions placed on the autopsy?
"Answer: I think she asked me to question what parts of the body can I do an autopsy on and I told her the lungs, not the head. It seems like the lower back. I gave her permission for that part."
Q So you gave permission to do autopsy on the lungs and the lower back; right?
A That is true.
Q When you and Dr. Turner were discussing the autopsy, you knew that Mrs. Wiley had been treated for breast cancer, didn't you?
A During this time?
Q Well, let me back up.
A I'm not sure.

Q Let me back up for a moment. During the time that Mrs. Wiley was in Ball Memorial Hospital in June of 1991 during her last illness, can we focus on that period of time for a minute?
A Yes.
Q Wasn't Mrs. Wiley treated for breast cancer?
A I didn't know. I don't believe.

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Q Am I telling you something here this afternoon that you are hearing for the first time?
A I've heard it in the last few days, I would think, but I didn't know about the breast cancer at all.
Q So when you heard the lawyers talking about the fact that Mrs. Wiley was treated for breast cancer in June of 1991 in this trial, that's the first time you had ever heard that?
A I believe that's the first time.
Q Never discussed that with -- let me back up for a moment. Did you ever talk to Dr. Joseph Songer?
A I did, but I don't remember our conversation. I just don't recall. I don't

recall.
Q You don't have any recollection of ever talking to Dr. Songer about the possibility that your wife may have had breast cancer?
A I don't recall, sir.
Q After Mrs. Wiley died, Dr. Turner called you by telephone from time to time, didn't she?
A Two to three times.
Q And didn't you obtain a copy of the autopsy report from Dr. Turner?
A No, sir. I received the message by telephone.
Q I'm sorry. Message about what?
A The report.
Q You called in and asked what was in the report?
A No. No, sir. She called me.
Q She called you and she discussed with you what was in the report. I don't want you to tell me what she told you, but just the fact that she called you?
A Yes, that's true.
Q And do you recall, Mr. Wiley, that after Mrs. Wiley had passed away, that you went to the Veteran's Administration Hospital with

your attorney, Tom Young?
A Yes, sir.
Q And you went there to talk to a Marilyn Bardsley? Do you recall that?
A Yes, sir.
Q You went there to talk to a Roberta Jeffers; is that so?
A Yes, sir.
Q And did you talk to them about being witnesses in this case?
A No, sir.
Q Mr. Young brought along a video camera on that occasion, didn't he?
A That is a possibility.
Q You don't remember that?
A No, I don't remember that.
Q You remember telling us that he did in your

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deposition? I can get it out if you like.
A It's a possibility that he had a camera.
Q All right. And that same day you recall you met with Dr. Turner in Muncie at her office in Ball Memorial Hospital?
A Yes, sir.
Q And that you discussed your claims with her?
A Yes.

Q And Mr. Tom Young and Mr. Joseph Young, two of your attorneys who are here today. Excuse me, Mr. Tom Young is not. Mr. Joseph Young -- were in that meeting with Dr. Turner and you?
A Yes, sir.
Q And in that meeting you and your attorneys asked Dr. Turner to help you with your claims? Correct?
MR. HOWARD: Your Honor, plaintiffs would object to this line of questioning on the grounds of relevancy.
THE COURT: Mr. Howard, I'm going to ask that the attorney that began with the witness make any objection.
Mr. Motley.
MR. MOTLEY: I adopt his objection, Your Honor. I was reading. I'm sorry. I don't even know what he said. I was reading, Your Honor. I apologize.
Q I'll repeat the question for Mr. Motley. The question was, in that meeting with Dr. Turner and your attorneys, you and your attorneys asked Dr. Turner to help you with your claims?

MR. WAGNER: That's the question, Mr. Motley.
MR. MOTLEY: I object again on the grounds of the in liminie motion that Your Honor has already granted. And if he opens that up, we would like to go into it fully.
MR. WAGNER: I'm talking about his claims fully. I haven't specified what claims we're talking about here.
MR. MOTLEY: He's suggested claims, Your Honor, and I think I ought to be entitled to ask the man about it.
MR. WAGNER: I'm asking one question here at a time. Mr. Motley --
THE COURT: The objection to the last specific question is overruled. You may answer that question.
Repeat your question, Counsel.
Q All right. We were talking, Mr. Wiley, about a meeting that you had at Ball Memorial Hospital with Dr. Turner and your attorneys. Do you remember that?
A Yes, sir.
Q And isn't it a fact that in that meeting you and your attorneys asked Dr. Turner to help

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you with your claim? It's a yes or no question.
A I asked -- yes.
Q All right. Thank you.
And then after that meeting you and Mr. Young went to the Veteran's Administration Hospital.
A Yes, sir.
Q And you met there with Marilyn Bardsley and Roberta Jeffers at that time?
A We visited with them upon arrival.
Q And Mr. Wiley, isn't it also a fact that you have talked to one of Mrs. Wiley's co-workers by the name of Jean Lavengood about being a witness for you?
A No, I have not.
Q You never did that. Okay.
Now, you told us about the number of years that you lived on or rather in your house on West 10th Street in Jonesboro, Indiana. Do you remember that?
A Yes, sir.
Q And was your house there on West 10th Street in Jonesboro, Indiana, tested for radon?
A At the time that I sold the house, it was

tested for radon.
Q Well, it was tested for radon on at least one other occasion; was it not?
A I don't recall.
Q Do you recall that your attorneys made arrangements for radon testing at that house in August of 1993?
A That is a possibility. I wasn't present.
Q I'm going to show you what has been previously marked for identification as -- I'm going to show you two letters, actually. I'm going to show you what's previously been marked for identification as Defendants' Exhibit S1739S3, and I'm going to show you another letter previously marked for identification as Defendants' Exhibit R1738S3. Take a moment, please, and familiarize yourself with those.
A Okay.
MR. MOTLEY: Can I see it?
MR. WAGNER: I'm sorry.
Q Have you had a chance to read those, Mr. Wiley?
A Yes, sir.
Q Do you recognize those two exhibits as being

letters that were written -- first of all let's talk about the August 4, 1993 letter, Defendants' Exhibit S1739S3. Do you see that? That's a letter that was written by your attorney, Max Howard; is that right?
A That is true.
Q And in that letter, he's requesting a radon test to be done at your home in Jonesboro,

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Indiana?
A Yes, sir.
Q And Defendants' Exhibit R1738S3, do you see that's a letter dated February 22, 1994?
A Yes, sir.
Q Addressed to your attorney, Max Howard by the Hydrotech Corporation?
A Yes, sir.
Q And setting out the results of the radon test at that home?
A Yes, sir.
Q And have you ever seen these two documents before?
A No.
Q Nobody ever shared these with you?
A No, sir.
MR. WAGNER: I'll offer into

evidence these two exhibits, Your Honor.
MR. MOTLEY: No objection, Your Honor.
THE COURT: I need to get the numbers again. Could you hand me the exhibits. Just hand them to me and I'll --
MR. WAGNER: I've got extra copies.
THE COURT: S1379S3 and R1738S3. Is that correct?
They'll be admitted.
(Defendants' Exhibit(s) S1379S3 and R1738S3 received in evidence.)
Q These tests that are depicted in these letters, they were actually conducted after you moved out of that home; correct?
A That is true.
Q I think you told us that you lived in that home from, I believe, about 1973, 1974 up until 1991; correct?
A Yes.
MR. WAGNER: That's all I have, Your Honor.
THE COURT: Mr. Ohlemeyer, any questions, Counselor?
MR. OHLEMEYER: Just a couple, Your

Honor.
CROSS-EXAMINATION (CONT.)
BY MR. OHLEMEYER:
Q Mr. Wiley, my name is Bill Ohlemeyer and there has been some talk about your deposition. That's actually where we met; right? Do you remember that?
A That was true. I remember that day.
Q It was actually downstairs in this building?
A Yes, sir.
Q And unfortunately, sir, both times we've met haven't been under anything that anyone would describe as anything but difficult circumstances; isn't that right?
A That's true.
Q I'll be very brief. I know you've been here a long time. That deposition was in July of

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1994. Isn't that right? Do you recall that?
A I believe so.
Q And you had -- there were attorneys there who were representing you?
A Yes, sir.
Q There was a court reporter there who took down the testimony?

A That is true.
Q And they made -- the court reporter had you take an oath just like the judge did here?
A That's true.
Q But that was before you hired Mr. Motley and his firm to help with this lawsuit; right?
A That's true.
Q Do you know, Mr. Wiley, what a transthoracic needle biopsy is?
A No, sir.
Q Do you know whether any of Mrs. Wiley's doctors, the doctors who were treating her, ever performed a transthoracic needle biopsy on your wife?
A No, sir, I do not know.
Q Mr. Motley had you draw a map of Marion, and he had your house and the river and this dump. Am I right that the VA Hospital, though, was about a half a mile or a mile from where that dump is?
A I don't believe it was that close.
Q If I had a map, could you -- would you be able --
A You see, I'm not acquainted with the dump. That's the problem.

Q All right. Fair enough.
Mrs. Wiley looked forward to her work; is that what you told Mr. Wagner?
A Yes, sir.
Q Did she look forward to her evaluations each year?
A That's an unfair question.
Q Well, she should have looked forward to them; isn't that right?
A She had a good record.
Q They were all very good evaluations?
A That is true.
Q And did her evaluation each year always result in an increase in pay for her?
A Yes, sir, she got increases.
Q And she got some awards at the hospital?
A Yes, she did.
Q And did she get them, were there awards banquets where she would go and she would get these awards?
A Not necessarily. They would have maybe a lunch on the floor of the hospital or something like that.
Q And there would be a little ceremony where your wife would get an award?

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A I think it would be very short.
Q Have you seen -- the reason I ask is because I've seen some pictures of what I think is Mr. Chrisman giving your wife some of these awards. Have you seen those pictures?
A Yes, sir.
Q Did you ever meet Mr. Chrisman?
A If I did, I don't recall.
Q From what you observed of your wife and her work, did she have respect for the people who ran that hospital?
A Yes, she did.
Q Did she have a good relationship with the people who ran that hospital?
A Yes, she did.
Q Did she feel like they listened to her if she had something she thought she needed to tell them?
A That's a possibility, yes.
Q Mr. Motley had you read from an exhibit that was marked and admitted as Exhibit 3, Plaintiffs' 3, which was one of your wife's evaluations; isn't that right?
A Yes, sir.
Q And there is no doubt that your wife was

considered a leader at the hospital.
A Yes, sir.
Q Both among the people she worked with --
MR. MOTLEY: Excuse me, Your Honor. I don't mean to object, but counsel went into those about being a leader and all that. I don't know why we're repeating all that.
MR. OHLEMEYER: I'll move on, Your Honor. Just one question.
THE COURT: Go ahead.
Q Your wife was considered a leader both among the people she worked with and among the people in the hospital; right?
A Yes, sir.
Q Now, Mr. Wiley, let me hand you what I've marked as Defendants' Exhibit Q1. This is a picture that your attorneys provided to us before the trial. Is that a picture of your wife?
A That's my wife.
Q And where was that picture taken; do you know?
A We were on vacation in Washington, DC.
Q When was that vacation?

A I don't know.
Q And describe how that picture came about.
A I told her since she works at the Veteran's Administration, I will just take her picture in front of the sign.
Q The sign that says "Veteran's Administration Hospital"?
A Yes. The printing office.

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Q And that was the headquarters of the people who ran the hospital where your wife worked.
A This? Yes, she worked for the Veteran's Administration, but this was the printing office.
Q Okay.
A Yes.
Q Why did you take the picture in front of the printing office?
A Just for the fun of it.
Q Thank you, Mr. Wiley.
MR. OHLEMEYER: Your Honor, I would move Defendants' Exhibit Q1 into evidence.
MR. MOTLEY: No objection.
THE COURT: Did you say P1?
MR. OHLEMEYER: Q1.
THE COURT: That will be admitted.

At some point I would like to publish it, but not now.
(Defendants' Exhibit(s) Q1 received in evidence.)
MR. OHLEMEYER: You can pass it to the jury now, Your Honor. And at some point we may simplify the exhibit numbers for you.
THE COURT: I hope.
MR. OHLEMEYER: Thank you, Mr. Wiley. No further questions.
THE COURT: No other cross-examination, Counsel.
MR. WAGNER: I'm just retrieving documents.
THE COURT: Mr. Motley, any redirect?
MR. MOTLEY: Yes, Your Honor.

REDIRECT EXAMINATION
BY MR. MOTLEY:
Q How are you feeling?
A I'm feeling good, thank you.
Q Have you got some water up there?
A Yes, sir.
Q Mr. Wiley, I think you've demonstrated to us that you're not very good at dates, are you?

A I told you that in the beginning.
Q Okay. When did you go to Washington on that vacation; do you know?
A I do not know.
Q Would your children possibly know? Could they help us with that when they get here?
A That's a possibility.
Q Your deposition was taken on July the 19th, 1994. If I tell you that's what it says --
A Yes, okay.
Q You don't know when the first time your lawyers met with me being four weeks before that, do you?
A No, I don't.
Q I'm going to ask you about this business about the autopsy, okay.
A Yes, sir.

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Q Now, they suggested to you, the lawyer did, that you restricted that autopsy to the lower back and lungs. Do you remember him asking you that?
A Yes.
MR. MOTLEY: Your Honor, may I show, since I don't have multiple copies, may I show the deposition to the witness?

THE COURT: Go ahead, Counsel.
Q He read to you from page 30 and 31.
A Yes, he did.
Q Okay. Let's read this question and answer. I'll tell you what I'll do.
MR. MOTLEY: With the Court's permission, can I put this on the screen so the jury can see?
MR. WAGNER: Can you tell me where you are, Mr. Motley?
MR. MOTLEY: Page 31.
Q Look when it comes up on the screen, Mr. Wiley, look at the part that I've underlined. Can you see that? Didn't Mr. Ohlemeyer ask you, "Did Dr. Turner suggest to you areas of autopsy or did you suggest to Dr. Turner areas of the autopsy?
"She asked me what parts of the body I had, did I have any problems, or I told her the areas that I didn't feel that I wanted to do an autopsy.
"And you identified the lungs and the lower back as an area that you did?" In other words, have an interest in.
And you said, "Yes."

A Yes.
Q And then he asked you why the lower back and you said because of her back pain?
A That is true.
Q Fact of the matter is you signed an authorization, didn't you?
A That's right.
Q And the only thing you restricted them from doing was the brain action, isn't it?
A That was true.
Q And Mr. Ohlemeyer had that question when he questioned you on that deposition?
MR. OHLEMEYER: Objection to this as leading.
THE COURT: Leading, Counselor.
MR. MOTLEY: Thank you, Your Honor. May I show this to Counsel?
Your Honor, may I approach the witness?
THE COURT: Go ahead.
Q Is this the autopsy authorization of Mildred Wiley?
A Yes, sir, that's my signature.
MR. MOTLEY: I'll move it into evidence, Your Honor.
MR. OHLEMEYER: No objection, Your

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Honor.
MR. MOTLEY: It's Exhibit, Your Honor, 7.
THE COURT: Plaintiffs' Exhibit 7 will be admitted.
(Plaintiffs' Exhibit(s) 7 received in evidence.)
MR. MOTLEY: I'm all thumbs.
Q I forgot to ask you, did you see where you signed for a complete autopsy on the remains of Mildred Wiley? Do you see the words "complete autopsy"?
A Yes, sir.
Q Later you called the doctors and you did make a restriction. Do you remember that?
A Yes, sir.
Q And you called them and you told them that the only thing you didn't want them to look at was what? What does that say in the autopsy report?
A The brain.
Q The brain.
A The brain.
Q And, in fact, sir, they autopsied -- they did a standard "Y" incision on your wife?

Do you know that?
MR. WAGNER: Objection, Your Honor. It's leading and there is no foundation laid that this witness would know that.
THE COURT: It was leading. Sustained.
Q This is the autopsy report. Does it say how it was done? At the bottom, sir?
A Yes, sir.
Q What does it say?
A Y.
Q Y incision. And you know that they looked at your wife's neck and larynx. Do you see that?
A Yes.
MR. WAGNER: Your Honor, is it proper to examine a witness about a document that he knows nothing about?
THE COURT: Is that into evidence, Counsel?
MR. MOTLEY: If it's not, I'm sorry. I'll move it into evidence. Somebody give me an extra copy of it, please. Move it in, Your Honor.
THE COURT: That's 8?

MR. MOTLEY: Yes.
THE COURT: Any objection?
MR. OHLEMEYER: No objection, Your Honor.
MR. WAGNER: No objection, Your Honor.
THE COURT: Plaintiffs' Exhibit 8 will be admitted.

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(Plaintiffs' Exhibit(s) 8 received in evidence.)

Q No. 8 indicates they looked, they did a standard Y, they looked at the pancreas?
A Yes.
Q They looked at the adrenal gland.
A Yes.
Q They looked at the urinary tract?
A Yes.
Q They looked at the genital tract?
A Yes.
Q The gastrointestinal tract?
A Yes.
Q The central nervous system due to autopsy restriction obtained after telephone conversation with you?
A Yes, sir.

Q The brain was not examined?
A Yes, sir.
Q So if the suggestion is made that you restricted that autopsy to the lower back and the lungs, that wouldn't be true, would it?
A That wouldn't be true, no.
Q I want to ask you some questions, Mr. Wiley, about some of these reports that Mr. Wagner put into evidence.
MR. MOTLEY: Do you folks still have those?
Do they still have the copies of those reports, Your Honor?
THE COURT: I believe they do.
MR. MOTLEY: Okay.
Q I want to look first at the CompuHealth one. I don't know the number.
MR. WAGNER: It's down at the bottom.
MR. MOTLEY: I believe, Judge, it's 1685A. May I show this on the screen?
THE COURT: Sure.
Q Do you have your copy there?
A Yes, sir.

Q Can you see it on the screen just as easily?
A Yes.
Q Because I marked it to save time.
MR. MOTLEY: Can you focus better than that?
Q Okay. Mrs. Wiley is a 52-year-old white female. Her last medical checkup was one to three years ago. Her doctor examines her breast at least once a year.
A Yes, sir.
Q She has lost 10 pounds in the last year, which was due to dieting. She has had three negative pap smears within the past five years. She states that her health is generally good.
Now, is that what you thought your wife's condition was like at the time this

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was done?
A Yes, sir.
Q Major illnesses and conditions. During the past three years she's had pneumonia. During the past three years --
MR. WAGNER: Five.
Q Five years -- what in the world does that say? I can't --

MR. MOTLEY: I'm getting blinder as the days grow older, Your Honor.
Q Past five years she has had stomach pains relieved by antacids, Tums, and had painful urination. She bruises easily or has bleeding tendencies. Immediate blood relatives show no history of having cancer. Is that consistent with what you know?
A That's right.
Q Talking about her parents?
A That's right.
Q It says no smoking.
A That's right.
MR. MOTLEY: Next page, please.
Q Are you aware that your wife was in such good health that they told her she was going to live longer than normal people?
A Yes.
Q It says right here, "Even though you are 52 years old, your chances of living beyond the next ten years have been appraised as the same as an average white female of age," what does that say?
MR. WAGNER: 48.8.
Q "48.8." In other words, she was in such

good health, that she was four years younger than her stated age.
A That's right.
Q They say, "Congratulations on keeping a healthy lifestyle." It says, "Your appraisal age are beyond your control." Excuse me. "Certain things which affect your health appraisal are beyond your control, such as family medical history. There are some things you are doing which improve your prospects for a healthy life, such as not smoking."
MR. MOTLEY: Is there anything else underlined on that page? If not, turn to the next page, please. The next page that I have marks on, if that's the last page I've got marks on, that's the last I wanted to ask him.
Q Now, I want to ask you about the ENT, if I can find it.
MR. MOTLEY: Judge, I'm sorry. I'm just all thumbs here. Can I have another copy? I marked it up and it disappeared.
Q While they're looking for a copy of the ear, nose and throat, why did Mildred Wiley leave

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the VA Hospital, to your personal knowledge?
A She didn't leave the VA Hospital because she enjoyed her work and because of the fact that we needed a second job in our family. She stayed at the VA Hospital because she wanted to help her two children with their college education, financially.
Q Now, they asked you questions about the other hospitals that Mildred worked in in Indiana. Do you remember that?
A That's true.
Q Have you ever visited those hospitals when she worked there?
A Yes, sir.
MR. MOTLEY: Your Honor, I'd like to ask a question, since they asked that question. I don't want to trespass on Your Honor's order. I'll be glad to come to the bench or make a proffer or whatever.
THE COURT: Good time for a break. Ladies and gentlemen, please leave the exhibits on the chair. If you want to, you can take your notes with you or you can leave your notes in here also. I do not want exhibits to leave the courtroom.

You're free to go outside if you like. Don't talk to anybody about the case, don't talk among yourself about the case, don't form or express any opinions. We need about 15 minutes.
(Outside presence of jury)
THE COURT: Be seated. We're still on the record.
Mr. Wiley, you may step down from the witness stand.
MR. MOTLEY: Did you want him to be excused, Your Honor, since I'm going to be going into what I'm going to ask him and what I expect to proffer?
THE COURT: He can stay. I have an idea what you want to go into, but tell me.
MR. MOTLEY: Judge, it's unfair for them to stand up here and talk about she could have left her employment and gone to another hospital where she had worked before, suggesting to the jury that those were smoke-free hospitals, where there has been no problem when, in fact, the truth of the matter is and to his personal knowledge those places were laden with smoke, too, and

that's where she worked.
So to suggest to the jury by this cross-examination that there were other places she could have gone to work if she choose to be in this den of smoke and leave the impression with the jury, which everybody in this courtroom knows is not correct, that these other hospitals didn't

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also have smoking problems is unfair, it's prejudicial and they opened the door. And with Your Honor's permission, I got a Mack truck I would like to drive through it.

MR. WAGNER: Mr. Motley, of course, wants to engage in hyperbole, Your Honor, but I'm sure Your Honor is listening to the line of cross-examination. Never at any time did I ask Mrs. Wiley or Mr. Wiley about any exposures in those hospitals to anything. I simply established, tried to establish, that Mrs. Wiley worked in a number of hospitals. And the point that I made was, as Your Honor may recall, that Mrs. Wiley was a marketable nurse who could have had a job almost anyplace. She never had a problem getting a job at any hospital

or clinics. She could very easily have left the Veteran's Hospital.

Plaintiffs have tried to make the point over and over again that Mrs. Wiley had to stay at the Veteran's Administration for some reason, and I simply demonstrated by my cross-examination that Mrs. Wiley was a marketable commodity, a nurse who could get a job almost anyplace, and she did that by working at all these various hospitals.

At no time, never once during my cross-examination did I ask any question about her exposures to anything in those other hospitals, chemicals, smoke or anything else. I simply established where she worked and when she worked and that was it. There isn't any scintilla of argument here that I opened the door to the issue that Your Honor has very firmly closed.

MR. MOTLEY: He asked her if it was her choice to stay there at the VA. He suggested, Your Honor, not so subtly that she could have gone to these other places. If she would have only gone there, we wouldn't have this trial. He didn't have to

ask these kinds of questions. He's understood; he's the one who tried to keep it out. I understand Your Honor's ruling, which is why I asked you if we could do this out of the presence of the jury. Judge, it's unfair.

THE COURT: I wrote it down when you asked the question. I knew we would revisit this issue, Mr. Wagner. Mr. Motley is correct. You opened it up.

We'll take ten minutes. We'll break for about 15 minutes.

(A brief recess was taken.)

THE COURT: Be seated. All right. The jury back in its entirety together with the three alternates. We're on redirect examination of Mr. Wiley.

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Again, state your name, sir.
THE WITNESS: Philip Wiley.
THE COURT: You recognize you are still under oath.
THE WITNESS: Yes, sir.
THE COURT: All right. Proceed, Mr. Motley.
BY MR. MOTLEY:

Q Mr. Wiley, you were asked by Mr. Wagner about the other hospitals that your wife worked in.
A Yes.
Q And I think he read the names of them but just to make sure, your wife worked at the Clinton County Hospital for about 15 months from 1968 to 1969. Right?
A Yes, sir.
Q And she worked for almost four years at the Davis Clinic in Marion, Indiana.
A Yes, sir.
Q Okay. And she worked at Ball Memorial in Muncie for six or seven months.
A That is true.
Q All right. And then you've already told us she worked for different periods of time at Oregon; correct?
A That is true.
Q Now, for each one of those I read you, the Davis Clinic, the Clinton County Hospital, the Ball Memorial Hospital and the hospitals, the Clinton County Hospital and the hospitals in Oregon, okay.
A Yes, sir.

Q On at least one occasion, on at least one occasion at each one of those hospitals, did you have occasion to visit your wife on the floor of those hospitals where she was working? I'm not talking about the VA. I'm talking about all those other ones.
A Yes, sir.
Q You did. And, sir, on the occasions when you visited that hospital, can you tell the ladies and gentlemen of the jury whether people were smoking in her vicinity that you observed?
A Yes, sir.
MR. WAGNER: Your Honor, excuse me. May I have the answer go out for purposes of making an objection for the record?
THE COURT: The answer will go out at this point.
MR. WAGNER: The witness answered too quickly. We want to make the objection that we previously made that this evidence is outside the scope of the issues in this case by virtue of the pleadings and the pretrial contentions filed, the arguments that we previously made to Your Honor.

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THE COURT: The Court's ruling dealt with whether or not it was proper area for Mr. Motley to go into on redirect examination. That was the Court's ruling, Counselor.

The objection is noted and you are overruled.

MR. WAGNER: Excuse me for interrupting and then I'll sit down. May we have a continuing objection to this line of questioning?

THE COURT: I will show a continuing objection on behalf of the defendants.

MR. WAGNER: Thank you, Your Honor.

THE COURT: Yes, sir.

Q Do you remember the question?

My question was, on those occasions in all those other hospitals where she worked, when you visited her at the hospital, did you notice people smoking in her vicinity?

A Yes, sir.

Q Any question in your mind?

A No question.

Q Now, you don't know what brands they were

smoking, do you?

A No, I don't.

Q Mr. Wiley, was your wife a complainer?

A No, she was not a complainer.

MR. MOTLEY: During the break I was able to find that which I couldn't find earlier because it was right under my nose, and I would ask Your Honor if I could have the jurors look at the ENT record that the defendants, and I don't know --

Do you know that number, Mr. Wagner?

MR. OHLEMEYER: 1694A, I think.

MR. MOTLEY: All right. My pages are reversed, so with Your Honor's permission, can I show this on the screen?

Q Would you be kind enough to look at the screen, Mr. Wiley.

A Yes, sir.

MR. MOTLEY: Let me see the very top so they'll know what these columns are for. Can you focus in on this, yes, no. I believe it's yes, no, and --

THE WITNESS: Don't know.

MR. MOTLEY: -- don't know. Okay. Back up now. Focus in on this, please.

Q She checked she had never had skin tests for allergies prior to that occasion. Is that the best of your recollection, too?

A Yes.

Q So no doctor had ever diagnosed her as being allergic to anything, had they?

A No.

Q And then when they asked her if she had any

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allergies, she checked what?
A Don't know.
Q And then she put down what she was allergic to is tobacco smoke; right?
A That is true.
Q Now, are you aware that in the medical records the doctor she went to rendered a diagnosis of whether or not she was allergic to anything?
A No, I don't know.
MR. OHLEMEYER: Is there a number?
MR. MOTLEY: I'm going to put it in. What's the next number, Mr. Cassell? 9?
MR. CASSELL: Yes, sir.
Q On this same form now, before I get to the diagnosis, "Which of the following do you

think cause your symptoms or make them worse?" She didn't know about indoors. She said outdoors does. She didn't know about at home. She didn't know about at work, did she?
A That's true.
Q Okay.
MR. MOTLEY: Is there another place in there while we're on there that I tagged?
Q Now, it asked her did -- she said that she thought she might be allergic to tobacco smoke. We saw that, right?
A Yes.
Q Although she said she didn't know.
A She didn't know.
Q "Do you think your occupation has anything to do with your symptoms?" What did she write?
A "Don't know."
Q "Are any materials used in your occupation that you think have something to do with your condition?" What did she check?
A "Don't know."
MR. MOTLEY: Up, please.
Q "At work are your symptoms better, worse or

the same?" What did she check?
A "The same."
Q Does that indicate to you that she knew that environmental tobacco smoke would hurt her?
A No.
MR. WAGNER: Object. Leading. Suggestive.
THE COURT: Sustained. The answer will go out. The jury will disregard it.
MR. MOTLEY: Your Honor, this is Exhibit 9. I move its admission at this time.
MR. OHLEMEYER: No objection, Your Honor.
THE COURT: Mr. Wagner?
MR. WAGNER: None, Your Honor.
THE COURT: All right.

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Plaintiffs' 9 will be admitted.
(Plaintiffs' Exhibit(s) 9 received in evidence.)
MR. MOTLEY: Can you focus that, please? This was after she went to see the doctor, the form we just looked at. This says, "The patient is a nonsmoker and a nurse at the Marion VA Hospital, and was in

her usual" good -- "her usual state of good health until October of 1990 when she developed what she considered to be a mild case of typical influenza. She recovered uneventfully except for a persistent cough which eventuated in her seeing Dr. Vesey," I think that is, "for ENT," that's ear, nose, and throat, "evaluation."
"Her (inaudible) and paranasal sinus on January 7th disclosed mild something." I can't pronounce it. "Thickening of the," some kind of "air cells consistent with ethmoidal sinusitis. She was apparently found to be allergic to house dust at that time." Does it say anything in there about tobacco smoke?
A No, sir.
Q She was treated with antibiotics and improved.
A Yes, sir.
Q Mr. Wiley, you were asked questions about Dr. Turner and your conversations with her. I want to ask you if you recall giving this testimony to Mr. Ohlemeyer about your -- questions Dr. Turner asked you about your

wife's workplace, page 14, please, with Dr. Turner. Do you recall Mr. Ohlemeyer asking you those questions?
MR. OHLEMEYER: Your Honor, I object to this. It's improper use of a deposition. It's redirect examination.
MR. MOTLEY: Yes, sir, but Your Honor, they cross-examined him about what Dr. Turner was told by him about how frequently he visited the hospital. This goes straight to this issue, consistent with his testimony on direct.
THE COURT: Are you asking him to refresh his recollection here?
MR. MOTLEY: Yes, I am.
THE COURT: He can do that.
THE WITNESS: Yes, he can do that.
MR. OHLEMEYER: Now he has to ask him a question.
MR. MOTLEY: I am.
Q "Is it true, sir, that with regard to the patients smoking, the day room for the patients was right across from the nurses' station?
"I had gone there several times in the

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18 years that she worked and I remember the conditions."

Is that true?

A That is true.

MR. WAGNER: Wait just a minute. I object to questioning the witness from his deposition testimony. This is plaintiffs' own witness. You can't read the plaintiffs' deposition to him.

THE COURT: Sustained. I thought you were going to let him refresh his recollection. Now you can ask him questions. But I don't want the deposition read.

MR. MOTLEY: I'm sorry, Your Honor.

Q Is it a fact that when you went for the 18 years that your wife worked at the VA, that you went there, that the conditions were smokey?

MR. WAGNER: Leading and suggestive.

MR. MOTLEY: May I rephrase that?

Q Describe the conditions with respect to smoke in the air as you observed them, sir.

MR. WAGNER: Your Honor, I want to

object also. This is improper redirect examination. This was gone into on direct examination and cross-examination. It's improper redirect and it's been asked and answered by counsel during the direct examination.

THE COURT: I'm going to overrule that. You can answer the last question. He asked you to describe the conditions as you recall.

A Yes. I recall the conditions were bad.

Q Did you tell Mr. Ohlemeyer that there was a haze of smoke?

MR. WAGNER: Your Honor, leading, suggestive, improper as to form.

THE COURT: Sustained. You don't have to answer that.

Q By the way, Mr. Wagner asked you about the trips you and your wife took. Do you recall that?

A Yes.

Q And you went to California, and you went to Grand Canyon, and you went to Peru, all the other places you went. Did you fly to any of those places on a commercial airline?

A Yes, sir.

Q Was there smoke on those airlines?

MR. WAGNER: May I have the same objection, Your Honor, as to airplanes as we had to other hospitals?

THE COURT: All right.

MR. WAGNER: Thank you.

THE COURT: Objection is noted and

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overruled.
Q Was there smoke on those airplanes, sir?
A Yes, sir.
Q And, sir, back before 1976, do you recall that they allowed smoking on airplanes?
MR. OHLEMEYER: That's leading.
MR. WAGNER: Leading and suggestive.
MR. MOTLEY: I'll rephrase it.
Q Did you travel on airplanes before 1976, sir?
A Yes, sir.
Q Do you know what brands those people were smoking on those airplanes?
MR. WAGNER: Your Honor -- never mind. I withdraw it.
THE COURT: You can answer that yes

or no.
A All the major brands.
Q How do you know that? You don't know that?
A I don't know. I don't know.
Q You don't know that, do you?
A No.
Q That's not fair, is it?
A No.
Q Now, you were asked this question: Did you visit your wife? And they said that you said six or eight times, I guess that was a year. Is that what you recall?
A Yes, sir.
Q When he asked you that and you said six or eight times, I don't know. Do you remember you said that?
A It could have been more than that.
Q Then you said something about cold weather. What did you mean?
A In the cold weather time when it was snow, I would go and clean off the windshield of her car, warm it up, and I would go in and tell her that I had taken care of her car. So there was many times that I, in the winter, I made more trips.

Q To your personal observation when you visited your wife before 1986, was the day room that they keep talking about the only place where patients and nurses smoked?
A No, sir.
Q Sir, you don't know when the Veteran's Administration adopted a total non-smoking policy, do you?
A No, sir.
Q You wouldn't know that date, would you?
A No, sir.
Q Now, I heard Mr. Wagner ask you questions about the days that your wife had off. Do you remember that?
A Yes, sir.
Q The breaks they had during the day?
A Yes, sir.

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Q Nurses' conventions. Do you remember all that?
A Yes, sir.
Q Well, did she ever work on the ward?
A Yes, sir.
Q Well, did she -- tell us about it. Did she go to work every day?
A She went to work every day.

Q And did she go to the hospital?
A Yes, sir.
Q In fact --
MR. MOTLEY: This is No. 10, Your Honor.
THE COURT: Fine.
MR. MOTLEY: I think they said they didn't object.
MR. OHLEMEYER: No objection, Your Honor.
Q Would you identify this, please?
A This was given to Mildred Wiley. Who had made a significant contribution to the mission of the agency, exceeding performance requirement. Yes.
Q And this was in 1989.
A That's right.
Q She got other awards?
A Yes, she did.
Q In fact, she received all kinds of awards and accommodations for work she did not at nurses' conventions but there, right there on the ward, didn't she?
A Yes.
THE COURT: You're offering that, Counsel?

MR. MOTLEY: Yes. May I show it to the jury?
THE COURT: 10 will be admitted. Go ahead.
(Plaintiffs' Exhibit(s) 10 received in evidence.)
Q Mr. Wiley, you were asked a lot of questions about your wife reading nursing magazines and all that?
A Yes, sir.
Q To your knowledge, did she -- to your knowledge, did she ever receive in a nursing magazine information that secondhand smoke caused lung cancer?
A No, sir.
MR. MOTLEY: I'm about done here, Your Honor.
Q When they asked you about the breast lump from Suriname, that report they gave you?
A Yes, sir.
Q Did that persist? In other words, did she continue to have those over time, or did they go away?
A I believe it went away.

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Q You described the pain in the lower back that your wife had prior to 1991, okay.
A Yes.
Q Could you stand -- with the Court's permission, could you stand up and demonstrate to the jury your best recollection of where that pain was.
MR. WAGNER: I don't know how this witness would know where his wife's pain was, Your Honor. I mean, she could be the only one who could testify to that. There's no foundation laid that he could ascertain that.
THE COURT: Why don't you lay a foundation.
Q Did you observe your wife when she complained to be in pain in her lower back?
A Yes, sir.
Q Would you show the jury what you observed about where she indicated she was having pain.
A You want me to stand?
Q If the Court allows you to.
THE COURT: Go ahead.
A Right there.

MR. MOTLEY: Your Honor, can I describe that as he indicated so the record will be clear, his tailbone area. Is that fair?
THE COURT: I think the record will be clear. Below the belt.
MR. MOTLEY: Your Honor, I hate to do this, but there is another area that I want to ask about that I suspect there may be an objection to. I would have every reason to believe that there would be one.
THE COURT: I appreciate you telling me, Counselor. Ladies and gentlemen, we need about five minutes out of your presence. Leave your notes, all the exhibits right there. Don't talk among yourselves about the case. Mr. Cassell will get you as soon as we're done here. About five minutes.
MR. CASSELL: All rise.
(Outside presence of jury.)
THE COURT: All right. Jury is not now present. Be seated.
Mr. Motley.
MR. MOTLEY: Yes, Your Honor. I

hate that I've had to do that again, but during the break my colleagues, since I wasn't there, advised me that this meeting between Dr. Turner and Mr. Young and Mr. Wiley was incident to the Veteran's Administration claim. And I know that Your Honor has excluded that. They raised it. They used the word claim instead of lawsuit

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or products liability lawsuit, and I want to be able to go into the fact that he discussed the claim, the VA claim with Dr. Turner and what happened as a result of that claim.

I think it's unfair for them to sit here and paint on this record that there was some grand conspiracy against Mr. Wiley and Mr. Young to bring this lawsuit, which is exactly what he suggested by using the word claim.

THE COURT: Mr. Wagner.

MR. WAGNER: Your Honor, the only thing that the jury heard was that there was a discussion with Dr. Turner and Mr. Wiley and the attorneys for Mr. Wiley about a claim, not a Worker's Compensation claim,

but a claim. This lawsuit is a claim. The jury knows nothing about a Worker's Compensation claim, Your Honor, so there has been no opening of the door to that at all. It was -- I was very careful not to mention the word Worker's Compensation at any time. The jury knows that this lawsuit is about a claim. And there is no hint in this record of having opened the door to a Worker's Compensation claim.

MR. MOTLEY: Your Honor, you know, they made these motions in limine. They were so frightened of the fact that this woman had been accepted for an award by the VA that they made this motion. Now they want to dance all around the quicksand here and, Your Honor, it's fundamentally not fair. They don't want it in yet they want to constantly talk about.

Remember they asked the jurors about Worker's Compensation claims and all that came up, because we have a testifying doctor from Indianapolis who testifies against workers, I suppose, in Worker's Compensation claims, and that's the reason I want to know

about Worker's Comp claims. I don't know how in the world that became so important in voir dire, but they suggested that to this jury.

Now they use the word claim and it's just fundamentally unfair to the plaintiff for them to try to profit by their own motion to the Court, to Your Honor, to exclude the claim. And they keep dropping these hints. It's not fair, Judge.

MR. WAGNER: Judge, there is no hint to this jury about anything that has to do with the Worker's Comp. The jury would have to be psychic.

THE COURT: I agree. I agree. I will decline the invitation to venture down that road. Mr. Wagner is correct on that.

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I will not permit counsel to go into that area. We need to talk about anything else outside the presence?

MR. MOTLEY: No, sir, Judge. I'm sorry. I didn't know about this until the break and I've only got two more questions.

THE COURT: It's all right.

MR. MOTLEY: Three more questions.

MR. CASSELL: All rise.

(Jury back)

THE COURT: All right. Be seated. Jury is now back, together with the alternates.

State your name again, sir.

THE WITNESS: Philip Wiley.

THE COURT: Continue, Mr. Motley.

BY MR. MOTLEY:

Q Mr. Wiley, you were asked questions about meetings with lawyers and doctors about this claim.

A Yes.

Q Why did you bring this lawsuit that brings us here today?

MR. WAGNER: Your Honor, that's not relevant.

MR. MOTLEY: Judge, they brought up --

MR. WAGNER: Why did he bring the lawsuit?

THE COURT: You may answer that question. Objection overruled.

Q Why did you bring this lawsuit? For what purpose did you bring this lawsuit that

brings us all here today?

A To protect children, to save lives.

MR. WAGNER: Your Honor, please. I hate to interrupt the witness' answer, but this is obviously a staged prejudicial question and answer session and I object to it, Your Honor.

MR. MOTLEY: Your Honor, can I --

THE COURT: The objection is overruled. You'll have a chance to recross, Counselor.

Q Didn't you tell him, these lawyers the same thing in your deposition?

A Yes, sir.

Q Back in 1994?

A Yes, sir.

Q Now, with regard to the radon test, sir. Do you remember that?

A Yes, sir.

Q You don't know what the lawyers who represent you did with that radon test with respect to giving it to doctors or anything, do you?

A No, sir.

Q Final question. Mr. Wiley, in your

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deposition, in 1994, at one point you were asked a question whether Mildred Wiley was exposed to cigarette smoke somewhere other than the VA Hospital and you said --

MR. WAGNER: Judge --

MR. MOTLEY: I haven't even finished, Your Honor.

MR. WAGNER: I know, but this is improper. We've gone through this five times. You can't ask a witness, your own witness, preface a question about what you said in a deposition.

THE COURT: I agree. That is sustained.

MR. MOTLEY: I have no further questions.

THE COURT: Thank you, Mr. Motley. Mr. Wagner, care to inquire further?

MR. WAGNER: Yes, I do, Your Honor. Just very briefly, thank you.

RECROSS-EXAMINATION

BY MR. WAGNER:

Q A couple of matters very quickly, Mr. Wiley. Mr. Motley asked you some questions about the autopsy. You were not present at the

autopsy, sir, were you?

A No, sir.

Q Doctors performed the autopsy; correct?

A Yes, sir.

Q And whatever the doctors did or did not autopsy, parts of the body and all that, would be something that the doctors would actually know about and not you; correct?

A I suppose, since I wasn't present.

Q Yes, sir. And when Mr. Motley asked you whether or not Mrs. Wiley went to work every day, she went to work every day except when she was on vacation. She didn't go then, did she, sir?

A That's true.

Q She didn't go to work when she was on holidays away from the hospital; correct?

A That's true.

Q And she didn't go to work at the Veteran's Administration Hospital when she was attending seminars and schools outside the hospital; correct?

A That is true.

Q And she didn't work there on weekends when she worked Monday through Friday; correct?

A That's true.

Q Mr. Motley asked you some questions about this allergy history and what the doctors found. And, sir, when I examined you, I didn't ask you whether or not Mrs. Wiley was diagnosed by a doctor as being allergic to tobacco smoke, did I? What I asked you was whether or not Mrs. Wiley put on this

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allergy history test that she thought she was allergic to tobacco smoke; correct?
A Evidently, yes.
Q Mr. Motley asked you a series of questions about the -- where your wife worked in a number of other hospitals and whether you were in those hospitals and saw smoking in those hospitals outside the Veteran's Hospital, Clinton Hospital, the hospitals in Oregon and all the other hospitals. Do you remember those questions, sir?
A Yes, sir.
Q He asked you about whether or not you ever rode on airplanes and whether there was smoking on airplanes. Do you remember those questions?
A Yes, sir.

Q And I'm going to show you another copy of your deposition, Mr. Wiley, that was taken on July 19, 1994 in this case. And I want to hand you page 120 of that deposition, sir.
MR. HOWARD: Which volume?
MR. OHLEMEYER: 1.
Q And when you gave that deposition, Mr. Wiley, on July 19 of 1994, you recall that you were sworn under oath to tell the truth?
A Yes, sir.
Q And when you gave that deposition, sir, you testified to the truth, didn't you?
A Yes, sir.
Q And would you read the question at line 11.
A "Can you identify for me any --"
Q No, sir. You have to start at the beginning.
A Okay. "As we say here today, can you identify for me anyplace your wife was exposed to cigarette smoke besides at her place of employment at the VA Hospital?"
Q And, sir, what answer did you give under oath on that day?

A I said, "No, I cannot."
Q And that was the truth, wasn't it, sir?
A Yes, at that time, I said that was the truth.
Q And it's the truth today, isn't it, sir?
A As the record stands there.
MR. WAGNER: I thank you. I have no further questions.
THE COURT: Mr. Ohlemeyer, any further questions?
MR. OHLEMEYER: Just a couple, Your Honor.

RECROSS-EXAMINATION (CONT.)
BY MR. OHLEMEYER:
Q Mr. Wiley, I'll be brief. Mr. Motley asked you about the VA policies on smoking. Is it fair to say you don't know in any detail

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what kind of policies or restrictions the VA actually put out with respect to smoking at the hospital?
A I wasn't in on making the policy.
Q And with respect to the lump in your wife's breast that was described in that medical record from South America, am I right that she didn't tell you about that at that time?

A I don't recall of her telling me.
Q And you don't recall her ever telling you about it; isn't that right?
A I am just not sure about that.
Q And with respect to this autopsy issue, there will be some doctors who are going to come and testify about that, but as I understand it, there was no restriction on the ability of the doctors to examine Mrs. Wiley's breast at the autopsy; is that right?
A That's right.
Q Do you know why they didn't examine them under the microscope at that autopsy?
A No, sir, I do not know.
Q Okay. And then finally, Mr. Wiley, let me ask you a question. Mr. Motley is correct. I did ask you why you filed the lawsuit back in July of '94. Do you remember that?
A Yes, sir.
Q And you remember telling me that you obviously didn't want anyone to go through what your wife had gone through?
A That's true.
Q You also told me that you wanted to file a

lawsuit like this to stop smoking in the workplace; isn't that right?
A That is true.
MR. OHLEMEYER: That's all I have. Thank you, Mr. Wiley.
MR. MOTLEY: Three questions, Your Honor.
THE COURT: Pardon me?
MR. MOTLEY: I have three questions, if I might, Your Honor, in response to what they just brought up.
THE COURT: All right. Go ahead.

REDIRECT EXAMINATION (CONT.)
BY MR. MOTLEY:
Q In that deposition, would you pick it up again?
A Yes, sir.
Q Remember your answer, you said as I sit here today?
A Yes.
Q You said that, right?
A That is true.
Q And you were sitting there for two days, seven hours a day, weren't you?
A That is true.

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Q What would cause you to believe that there wasn't smoking in other hospitals where your wife worked?
MR. WAGNER: Objection, Your Honor, as to what would cause him to believe that. He can't rehabilitate the witness --
THE COURT: Sustained. Why don't you rephrase that.
Q Why would you -- what experience of yours would cause you to believe that there was not smoking in other hospitals?
MR. WAGNER: Your Honor --
MR. MOTLEY: I'm asking him what experiences.
MR. WAGNER: He can only testify to what he observed, not what may have caused him.
THE COURT: Sustained.
Q Did you see smoking in those hospitals or not.
A Yes, I did.
MR. MOTLEY: Thank you.

RECROSS-EXAMINATION (CONT.)

BY MR. WAGNER:

Q So, Mr. Wiley, when you gave this deposition

then under oath, you didn't tell the truth?
MR. MOTLEY: Judge, I object to that, that's not fair. He says, "as I sit here today."
A As I sit here today.
MR. WAGNER: I have no further questions, Judge.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: Nothing, Your Honor. Thank you.
THE COURT: That's all, Mr. Wiley. You may step down. Thank you, sir.
Would you hand your copies of your exhibits down to the bailiff, please.
Who is your next witness, Mr. Motley?
MR. MOTLEY: Dr. Victor Roggli, Your Honor.
THE COURT: Raise your right hand.

PLAINTIFFS' WITNESS, VICTOR LOUIS ROGGLI, SWORN

DIRECT EXAMINATION

BY MR. MOTLEY:

Q Dr. Roggli, will you spell your name for the record?
A It's Victor Louis Roggli, R-O-G-G-L-I.
Q Where were you born, sir?

A I was born in Winchester, Tennessee.
Q Where do you live now?
A I live in Durham, North Carolina.
Q What is your age, sir?
A Forty-six years old.
Q Are you married?
A Yes, sir, I am.
Q What is your profession?

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A I'm a physician and specifically a pathologist.
Q What is a pathologist?
A A pathologist is, literally pathology means a study of disease, and a pathologist is a physician who makes diagnoses based either on tissue samples sent to the laboratory, such as a biopsy sample or tissue obtained, removed at the time of surgery, or tissues examined at time of autopsy. Or a pathologist makes diagnoses based on fluid samples sent to the laboratories, such as a blood sample, spinal fluid or a urine sample for analysis.
Q Where do you practice pathology?
A I practice pathology at Duke University and at the Durham VA Medical Centers in Durham,

North Carolina.
Q Now, Duke University originally founded by money from people who own the American Tobacco Company, wasn't it?
A Yes, sir, it was. I believe it was, yes.
Q Duke family?
A Buck Duke in the 1920s or '30s gave money to Trinity College and converted to Duke University.
Q You all used to be number one at basketball, didn't you?
A We'll be back.
Q I wish I could say South Carolina would beat them, but that didn't happen either.
Now, in addition to being a pathologist, do you specialize in lung pathology?
A Yes, sir, I do.
Q Including cancer of the lung?
A Yes, sir.
Q Are you board certified?
A Yes, sir, I am.
Q And would you explain -- you're the first doctor to testify, so would you explain to the jury, please, Dr. Roggli, what it means

to be board certified.
A I'm board certified in anatomic and clinical pathology. And board certification is a way that specialties have to certify that people who practice that specialty have at least minimal competency in the area that they specialize. In order to do that, special requirements are given by the board before they will certify a physician as certified to practice in that specialty.
For example, in pathology, one has to spend, had to spend at the time that I did my training, a minimum of four years in an accredited training program and then take an examination, written examination, which is three days long. And if you pass the examination and had training in an

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accredited facility, then the American Board of Pathology certified you to be -- to be able to practice a specialty of pathology.

Q And what is the difference between clinical and anatomic pathology?

A Well, it's somewhat complicated and also the differences between those two have been muddied over the years. But in simplistic

terms, anatomic pathologist is the ones who looks at tissue samples under a microscope. I mentioned that pathologists make diagnoses based on tissue samples, oral fluid samples, and a clinical pathologist would be a pathologist who makes diagnoses based on fluid samples sent to the laboratory.

Q And you are board certified in both?

A Yes, sir.

Q Now, is there a board certification for pulmonary pathology?

A No. There is no special boards for pulmonary pathology. There are a number of us in the United States who have specialized and chosen to specialize in that particular area, and we have formed a Pulmonary Pathology Society which began a couple of years ago. And that has a list of those individuals who specialize in that area.

Q Where did you go to medical school?

A I went to medical school at Baylor College of Medicine in Houston, Texas.

Q And was there a somewhat world famous lung pathologist who was your mentor?

A Yes, sir.

Q Who was that?

A S. Donald Greenburg, who was one of the presidents of the Cytopathology Society of the United States, and was well known as a pulmonary pathologist in the United States and worldwide.

Q And had he published articles on lung cancer and cigarette smoking and the like?

A Yes, sir.

Q And you studied under him?

A Yes, sir.

Q What years?

A I studied in medical school from 1973 to 1976, and he taught the lung pathology sections that I studied as a medical student. And also from 1976 to 1980, I studied with Dr. Greenburg during my residency training in the specialty of pathology, after I graduated from medical school.

Q When you were in medical school, just to give the jurors some idea, you don't start right off in your first year studying pathology or studying TO be a pathologist, do you?

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A No, sir.
Q Tell them, give them an idea of what all you did at Baylor Medical School before you became a specialist in pathology. I don't mean, don't go on for ten minutes. Just a general overview of what went on in medical school.
A Well, when I went to medical school, Baylor was on a three-year program so that one could get an MD degree in three years. The first year was basically studying clinical basic science. We studied about biochemistry, microbiology, pathology, we studied about. We studied about anatomy of the human body, and we studied about microbiology and pharmacology.
In the second year we did basic clinical rotations, like in medicine and surgery. And then in the third year we had special electives, specialty areas such as gastrointestinal diseases that we took rotations in.
Q So you actually at some point in your training actually went out and at least followed doctors around who were examining

patients for clinical disease?
A Yes, sir. We followed doctors around and we did physical examinations and took histories of patients and drew blood and did many other procedures as we were learning and training.
Q And during what period of time would you have actually been on the floor doing clinical work of a hospital?
A I would say 1974 to 1976 while I was in my medical school training, and then off and on from 1976 to 1980 during my residency training.
Q What is residency?
A That's when you specialize in an area beyond just the general medicine that you learn in medical school. And my specialty area of training was in pathology.
Q And that was from what year that you were a resident?
A From 1976 to 1980.
Q So from 1974, essentially to 1980, there were times when you were actually out on the hospital ward looking at patients?
A Yes, sir.

Q After 1980, have your opportunities to go out on the clinical ward and examine patients disappeared?
A They've been significantly less, yes, sir.
Q And why is that?
A Well, I've been a practicing pathologist in the laboratory at Duke University and Durham VA Medical Center, so I've had less

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opportunity to have direct interaction with patients and spent more time dealing with tissue samples obtained from the patients and looking at them under microscope and making diagnosis.

Q What is the Board of Forensic, F-O-R-E-N-S-I-C, Pathology?

A Well, forensic pathology is a special area of investigative pathology which involves a lot of medical-legal-type work. It involves medical examiner-type work when you have deaths where there has been suspected foul play, homicide, suicides, that sort of area of investigation comes under the area of forensic pathology.

Q And are you a member of the Board of Forensic Pathology?

A I'm board certified in forensic medicine, and that was in the last several years that I've obtained that certification.

Q So you took a third specialty test?

A Yes, sir.

Q So you're board certified in two fields of pathology and in forensic or law medicine matters; correct?

A Yes, sir, correct.

Q Were you Phi Beta Kappa in college, sir?

A Yes, sir, I was.

Q Were you a member of Tau Beta Pi, the Honorary Engineering Society at Rice University?

A That's correct.

Q Were you in the Phi Beta Kappa of medical school, although it's got a different name?

A It's Alma Omega Alpha Society in medical school, that's correct.

Q Were you awarded the Outstanding First Year Medical Student in Pathology in Baylor College of Medicine?

A Yes, sir, I was.

Q Have you received cum laude and certificates of merit for scientific exhibits?

A Yes, sir, I have.

Q Do you teach medical students?

A Yes, I do.

Q Will you explain that to the jury?

A Well, I taught medical students, I guess beginning in my residency training in pathology in 1978 through 1980. I was a chief resident of pathology at Baylor College of Medicine. And I assisted our staff pathologist in teaching the laboratory course to the first year medical students at Baylor College of Medicine.

Since I've been at Duke, since 1980, I've been involved teaching the medical students every year except one, and that involves teaching the first-year pathology course in which I have a laboratory session

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for about eight or ten weeks where I teach the medical students general pathology, and I also give the lectures on lung pathology.

And also I teach the third-year medical students who come back to take elective courses in their third year in pathology, and the lectures I give to that group is also dealing with lung pathology.

Q I failed to ask you, Dr. Roggli, when you said that you had some hospital ward experience, if I can call it that, actually going out in the wards, what hospital was that at?

A Well, I was at a number of hospitals. I was at the Methodist Hospital in Houston, Texas; spent a little bit of time at Texas Children's Hospital; St. Luke's Hospital; and also spent quite a bit of time at the Houston VA Medical Center.

Q So you were at the VA Hospital?

A Yes, sir.

Q Doctor, have you received grants to study lung disease?

A Yes, sir, I have.

Q Can you, without going into all of the details, tell the jury some of the funding agencies that have given you money to study lung disease?

A I've received funding from the federal government through the US Public Health Service and the VA Administration for a number of years, and also I've received grants from the National Institute of

Health.

Q How many scientific articles have you published for other doctors to understand your findings?

A I would say I think there is about 115 or so articles in my CV that have been published or been accepted for publication in the scientific peer review literature.

Q How many of those deal with either lung disease or cancer?

A I would say about 95 percent.

Q So you published over 100 articles on lung disease or cancer?

A I think that's pretty close.

Q Have you studied lung disease, particularly lung cancer in association with cigarette smoking?

A Sure.

Q Doctor, to a reasonable degree of medical certainty, does cigarette smoking cause lung cancer in human beings?

A Yes, it does.

Q How do you know that?

A We know that from a number of lines of evidence, including epidemiologic studies.

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Q What is that?
A Epidemiology is the study of groups of patients with various diseases. The way an epidemiologist typically does a study is to look at two different groups, one that has been exposed to a particular material or substance and one that has not. And then the epidemiologist looks at the patterns of diseases in the two groups to see if a disease is associated with a group with exposure more so than the group without the exposure.

And in epidemiologic studies have been published since the 1950s and earlier have uniformly shown an association, strong association, between cigarette smoking and the development of lung cancer.

That's the first line of evidence.

Q So the first line of evidence is for, not to use that big fancy word, but statistical studies?
A Right.
Q Is there other evidence that cigarette smoke causes lung cancer or is it just statistics?
A No. There is much more evidence.

Q Go ahead.
A Next line of evidence is when you have an association between a particular substance and a disease, then you need to look and see if there is a biologically sound reason that explains the association. So if there is association between smoking and lung cancer, then you would expect to find cancer-causing agents in cigarette smoke.

So one of the things that was done in studies was to look and see what's in cigarette smoke. And it was found, has been found to date that there are approximately 50 different carcinogenic compounds, cancer-causing compounds that are present in cigarette smoke. So the biochemical evidence indicates that there is, in fact, cancer-causing agents in cigarette smoke.

Q Have there been animal studies?
A Yes. The third line of evidence would be animal studies which have been done. And studies have been done in various ways. And to make a long story short, a number of studies have shown in a number of species that exposure of animals to cigarette smoke

results in increased numbers of tumor production in experimental animals. And then there is a fourth line of evidence.

Q Go ahead.
A And that's pathologic findings, and that's the study of pathology which shows that in people who smoke compared to people who don't smoke, there are changes in the lining

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of the lung that are precancerous, that are highly associated with the cigarette smoking, and that -- those findings go to the pathogenesis or the way that cigarette smoke actually causes the disease cancer.

Q Doctor, do you know of any medical society in America that has concluded other than that cigarette smoke causes lung cancer in human beings?

A There is no such medical society.

Q Do you know of any government agency, US Government agency that has concluded other than that cigarette smoke causes lung cancer?

A I do not.

Q Do you know of any world health organization or European health organization that has

concluded anything other than that cigarette smoke causes lung cancer?

A No, sir.

Q Now, Dr. Roggli, did I or Mr. Patrick who is hiding back here behind this chart in case he messes up again, he's lost my documents a few minutes ago. Have Mr. Patrick or myself asked you to look at the medical records in this case?

A Yes, sir, you have.

Q And did you look at medical records we provided you about the medical history of Mildred Wiley?

A Yes, sir.

Q Okay. And did you in addition look at, actually examine under the microscope, tissue from her treatment while she was alive or from the autopsy?

A Yes, sir.

Q Which did you do?

A I looked at slides that were obtained at the time of autopsy and looked at reports of the medical records of biopsies obtained prior to her death.

Q All right. Now, Doctor, are you a member of

something called the North American Mesothelioma Panel or something like that?

A Yes, sir, the official name, I believe, is the United States/Canadian Mesothelioma Academy.

Q Would you explain what mesothelioma is and what's that got to do with lungs?

A Mesothelioma is a relatively rare type of cancer. It's much less common than lung cancer that arises from the lining or surface of the lung. And it can be a difficult cancer to diagnose because other cancers may be confused with it.

And as a result, there is a group of pathologists who have a special interest in diagnosing this disease who have come together to form a panel of ten physicians,

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seven of which are from the United States. And we serve as a reference panel for other pathologists who send us cases to see if their case is a mesothelioma, either because it's a particularly difficult case or because that pathologist does not have sufficient experience to be sure of the diagnosis and warrants a second opinion.

Q And how many pathologists are members of that board, sir?
A There's a total of ten, seven from the United States, two from Canada, and one from the United Kingdom.
Q Dr. Roggli, have you been invited to lecture about lung disease and lung cancer in various parts of the world?
A Yes, sir.
Q Can you give us some examples without going through the whole itinerary?
A I believe I've talked about some of my findings in lung cancer in Australia, Amsterdam, and in various locations, in the United States as well.
Q Are you a member of the editorial boards of any scientific journals?
A Yes, sir.
Q Which ones, sir?
A Modern Pathology.
Q What is that?
A That is a pathology journal which is the official journal of the United States Canadian Academy of Pathology.

MR. MOTLEY: Excuse me one second, Your Honor.

Q Doctor, did you, and at our request did you bring any graphs or drawings or anything that would help demonstrate to the jury how the lungs function and how cigarette smoke affects the lungs?
A I believe we have some, yes, sir.
Q Where are they?
A Should be there with the --
Q On the screen?
A Yes.

MR. MOTLEY: I have to show it to the other side.
Your Honor, may I approach with Mr. Ohlemeyer?

THE COURT: Sure.

(Bench discussion.)

MR. MOTLEY: Mr. Patrick, about how many are there?

MR. PATRICK: About five.

MR. MOTLEY: Can you put them up just to this screen? No. You can look at them back there.

MR. OHLEMEYER: Is that okay, Your Honor?

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THE COURT: Go ahead.
Mr. Ohlemeyer, have you had a chance to review those?
MR. OHLEMEYER: Yes, Your Honor.
THE COURT: Do you have any objections?
MR. OHLEMEYER: As demonstratives, I do not.
MR. MOTLEY: May the Doctor come down and use a pointer of some kind?
THE COURT: He may.
MR. MOTLEY: Would you show the first slide.

Q Doctor, I assume we must proceed in question and answer form for the record, so let me ask you, we'll call that chart No. 1 for demonstrative purposes. What does that show us?

A These show three different views of the spinal column, the bones that encase the spinal chord which comes down from the brain and sends nerves throughout the body. This one is the front view, this is the side view, and this is a rear view of the way the spine looks.

Q Anything else on there that you think the jury should understand?

A Well, they show that the various levels, and it shows in here the -- this is level L1, it was about L2, which is the second lumbar vertebrae or bone where Ms. Wiley had a metastasis or a spread through the bloodstream of her cancer to involve bone.

Q Could you turn around, Doctor?

A Shown right there in yellow.

Q Could you turn around and lift your jacket and point to your back where that would be?

A Well, approximately it would be somewhere around there.

Q Don't fall down.
Now, how would we describe that, the lower quadrant of the back?

A Yeah, lower, low back.

Q Just for the record, we'll understand.
Anything else on that picture that you want to show the jury?

A No. Wait. One more thing. This shows a dermatome area or an area of pain typically referred to by patients who have cancer of the pancreas. And one of the things that

you can see on the next film is that the level where Ms. Wiley had her pain and had her metastasis is lower than the area where you typically have pain referred from cancer of the pancreas or from pancreatitis.

Q Show us on your own back, if it had been pancreatitis or pancreatic cancer, where the pain would have been.

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A It's higher, more like mid-back in location, where that is indicated.
Q And how do you know that her pain was where you've colored it? I'm color blind, so what color is that?
A This is yellow here.
Q What's that?
A That's green there.
Q How do you know that her pain was there?
A This is where her complaint was of low back pain when physical examinations were done. It was indicated that the pain was close to the area of the L2 vertebra. And when radiographic studies were done.
Q What does that mean, radiographic?
A That's X-ray studies, including a CAT scan or computed tomogram of the spine showed

that there was destruction of a part of that vertebra in the L2 area.
Q All right. Do we have another slide, please?
What does this show, and can we make that a little clearer, perhaps, or not.
Okay. What is being demonstrated here, sir?
A Well, this is showing the location of the pancreas in the body. The organ shown here is the pancreas, and at the end of the pancreas is the organ called the spleen. Behind the pancreas is the left kidney shown there in brown, and over here is a cut-away view of a part of the small intestine called the duodenum, and the head of the pancreas, this portion right here, is nestled in the curve of the duodenum.
This also shows the blood supply through the pancreas, both the arterial and the vascular supply. It also shows nerve distribution to the area of the pancreas, and it shows here where you have pain from either cancer of the pancreas or pancreatitis, that it refers the -- the pain

is felt in the area where the nerves supply the pancreas, and that is shown in a belt-like pattern, the mid-part of the back here on this particular picture, which I think is subsequently shown.
Q That's where the pain would be if it was pancreatic cancer?
A Right, or pancreatitis.
Q Where was her pain?
A Her pain was down lower, about the L2 level.
Q Why is that significant, Doctor?
A Well, it indicates that the pain she had in her back was not the sort of a pain, that location of the pain or the type of pain that you would see in a patient who had pancreatitis or pancreatic cancer.
Q Are you done with that one?

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A Yes, sir.
Q Next one, please.
What does chart 3 demonstrate for us, Doctor?
A This shows the lungs, it's a cut-away view, and an illustration of the lungs from the -- this is showing the top of a right lung to the bottom of the right lung, top of the

left lung to the bottom of the left lung. Here in the middle of the chest is where the heart is located. Here is the windpipe or the trachea, as we call it, that goes down and divides into bronchi, which then branch repeatedly and supply air throughout the lungs. And just to give you some orientation here, diaphragm is located just underneath the lungs.
Q Show us on your body what you're talking about.
A Right here. The curved area beneath the lungs is where the diaphragm is located. And then below diaphragms are your abdominal organs located.
Q Where is your pancreas located in connection with your abdominals?
A It would be down here and posteriorly.
Q You're talking like a doctor. What does that mean?
A Posterior means from the back, near the back.
This diagram also shows that the lungs are divided into lobes. The right lung typically has three lobes: A right upper

lobe shown here; a right middle lobe shown there; and then a right lower lobe, which were highlighted in yellow for you, the middle lobe and the lower lobe. Then the left lung also has two lobes, left upper lobe and a left lower lobe. And these lungs -- these lobes are divided from one from another by what we call fissures that incompletely divide them so that this lower lobe is separated from the upper lobe by a fissure or a space between them, but it's not complete. So back here at this part of the lung the left, the right lower lobe communicates with the right and middle lobe.
Q Okay. Anything else on there that you would like to demonstrate to the jury?
Did you show the trachea?
A Yes. We mentioned the trachea here or the windpipe.
Q That's where the air gets in?
A Yes. One other thing I think it would probably be worthwhile to illustrate on this diagram is where the lymph nodes are located.
Lymph is fluid that can be found in any

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part of the body and drains to little structures called lymph nodes which you have throughout the body. A typical location that people may be familiar with, at one time or another you may have had a swollen kernel under your arm. That's a lymph node. Or in your neck. That's also a lymph node. But lymph nodes are actually in very many places in the body, including in the middle of the chest.

And the lymph nodes in the lung that drain the lung are located around these bronchi, the large airways in the central area, and then in the middle part of the chest called the mediastinum. That's where the lymph nodes are located and that will be important later as we talk about the location and origin of Ms. Wiley's cancer.

Q Chart 4? What is this a picture of, sir?

A This shows -- now we've removed the lungs and are just showing you the airways, the conducting airways, as we call them, that supply air to the working areas of the spongy lung. And it shows how the airways branch repeatedly so that you have this

airway supplying the right upper lobe which branches to branches throughout the right upper lobe. Then you have what's called the bronchus intermedius shown here which comes off of the bronchus intermedius, a branch to the right middle lobe and then a branch to the right lower lobe.

And then the left lung you have bronchus going to the left upper lobe and a bronchus going down to the left lower lobe that then branches repeatedly, so that you have air supply to all parts of the lung, so that the lung can do its job.

Q What is the lung's job, just for the record?

A There is many functions that the lung has, but the most important one that the lung has is for gas exchange. To give oxygen, life-giving oxygen to the bloodstream to supply throughout the body and to remove the waste gas carbon dioxide which is a waste gas or metabolism and remove it from the body. That's one of the major functions of the lung.

Q And is there something in the lung or are there things in the lung called alveoli,

A-L-V-E-O-L-I, or air sacs?

A Yes, sir.

Q What are air sacs or alveoli?

A At the end, at the final branch, I should point out the structures. The bronchi branch on the average 24 times until you get to the very smallest one in the human lung. And at the end then of the branch are the

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grape-like clusters of alveoli. And the grape-like clusters of alveoli are present at the end of every tiny branch of the air system, and they're throughout the lung; so that the average adult human lung has 300 million of these tiny grape-like structures called alveoli. And that's where the work of gas exchange in the lung takes place. Oxygen is absorbed from the air you take in. Carbon dioxide is removed from the body in the air that you breathe out.

Q Doctor, I read somewhere that if you took the human lung, I don't know that anybody would want to do this, but it has such a surface area that if you spread it out, how big would it be?

A It typically covers the area of a tennis

court, about 70 meters square, square meters.

Q If you deflated it and stretched it out?

A Stretched it all out like that.

Q I see some coloration on there.

A This shows the area of the bronchus intermedius which would be important as an anatomical landmark.

Q What does anatomical mean?

A That means where it's located in the body for Ms. Wiley's cancer.

Q Why is that important?

A Because this is the area that seemed to be very abnormal at bronchoscopy, on the second bronchoscopy that was done by Dr. Turner.

Q What is a bronchoscopy? The jury hasn't heard anything other than from lawyers about a bronchoscopy.

A Bronchoscopy is a technique which has been, has been around for many, many years. What used to be available was a straight metal tube called the Jackson scope which the surgeon would stick down the bronchial tube and could look, get about this far down and could look into the airways and maybe get

some samples of issue.

And then with the advent of fiberoptics, it became possible to have a flexible bronchoscope which could be pushed out further into the lungs. And that's typically the type of instrument that's used today, where the pulmonologist puts a scope down into the lungs, which is flexible and can go further out and look into these various branches and can sample tissue and send it to the laboratory.

But I think it's important to point out from this diagram that even with the bronchoscopes available today, you can only see up to the first few branches. You can only get the bronchoscope out to the first few branches of the lung and you can't get

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out to the far distant area where some cancers in the lung can arise.

Q Why have you colored that part?

A Because this was the area that seemed to be abnormal at time of bronchoscopy. This is the portion of the bronchus which leads to the middle lobe and the lower lobe where the main tumor masses were found in the case of

Ms. Wiley. And this is probably the area where the tumor originated.

MR. OHLEMEYER: Excuse me. Can you tell me what number that is?

MR. MOTLEY: That's 4.

MR. OHLEMEYER: Thank you.

MR. MOTLEY: Let's see 5, please.

Q What does 5 show us, Doctor?

A This is just another breakdown of the tracheal bronchial tree. It doesn't -- shows the windpipe coming down here. It shows the first few branches going to the right upper lobe, right middle lobe, right lower lobe, shows the bronchus intermedius again here.

The main importance of this picture is to show you a cross-section of what these tubes look like. And as you look at it at higher power, the entire tracheal bronchial tree, as we call it that, the conducting airway part of the lung, is aligned by a very thin delicate membrane of cells, and these are the cells which get transformed to make cancer cells in the lung and give rise to most lung cancers.

Q All right. Anything else on there?

A I don't think so.

MR. MOTLEY: Do we have a 6?

Q What does this show us, Doctor?

A This again, this gets back to the pancreas, its location in the body, and its blood supply. And what we see here, to get you oriented, the lungs would be above what you're seeing in this picture. Diaphragms which are under the lung would be at the top of this picture, and just below diaphragm is the stomach.

So we can see the stomach coming around here, the stomach giving rise to the first part of the small intestine called the duodenum which makes the curve that the pancreas is nestled into. So the pancreas is coming along here, as shown just behind the stomach, and down here nestled within the curve of the duodenum.

Now, the blood supply to the pancreas drains into the portal system which is the vein that goes into the liver.

Q Is that the liver right there?

A Yes.

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Q What did you all do there? What's that?
A This is showing the blood supply to the liver draining from the pancreas, and the way that the blood would flow is through the pancreas. So typically most of the time when you have a cancer of the pancreas that arises in the pancreas, most common place to find metastatic spread is to the liver. And the reason is because cancers spread by invading blood vessels and then pieces of tumor breaking off in those blood vessels and going to other parts of the body.
Q What's that right there?
A Well, what this is showing is that the blood supply from the pancreas, if the pancreas cancer invades blood vessels, invades the veins of the pancreas, it's going to then go into the portal system, and you should see metastatic deposits within the liver, which were not found at autopsy in the case of Ms. Wiley.
Q Okay. Anything else on that picture, Doctor?
A I think that's it.
Q Is there a seventh chart?

A I don't believe so.
Q Would you please return, and you can take that off.
MR. MOTLEY: Should I proceed, Your Honor?
THE COURT: Go ahead, Counsel.
Q Dr. Roggli, you reviewed the autopsy report in this case, which is Exhibit 8?
A Yes, sir.
Q And I want to show you the final finding. Would you show that on the screen, please.
An autopsy was performed -- first let me ask you this, Doctor.
Did the autopsy report reflect that permission was given by Mr. Wiley to do everything but the brain?
A That's my recollection, yes.
Q Now, here the autopsy report says in summary the immediate cause of death was adenocarcinoma of the right lung.
First question, to a reasonable degree of medical certainty, do you agree with the pathologist who locally did the autopsy and concluded as is reported on Exhibit 8?
A Yes, sir, I do.

Q Any question in your mind about that?
A No, sir.
Q None?
A No.
Q And it says the original death certificate signed as follows: Immediate cause of death: Adenocarcinoma of the right lung.
Do you agree with that?

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A Yes, sir.
Q Due to: Other conditions: Bilateral plural effusions.
What does that mean?
MR. OHLEMEYER: I think that -- I'd ask Mr. Motley to read it as written, Your Honor. It says "Due To:" And then there is nothing. Then there is another sentence that says "Other Conditions:"
Q You're right. I apologize. It says Due To, and there is nothing written right there; correct?
A Right.
Q Other conditions: Bilateral plural effusions.
A Yes.
Q What does other conditions, bilateral

pleural effusions mean?
A That means that fluid has accumulated in the space between the lungs and the chest wall, and there's a number of different causes for that. In this particular case it may have been due to terminal heart failure related to the patient's advanced state of cancer.
Q Okay. So you agree that the immediate cause of death was adenocarcinoma of the right lung?
A Yes, sir.
Q What is adenocarcinoma of the right lung?
A Well, there are four major types of cancer of the lung that originate within the airways, either the large bronchi or the smaller bronchiales, and we divide them into four patterns that you see under a microscope. So adenocarcinoma is simply a pattern which we see under a microscope.
The four patterns are squamous cell cancer, then small cell cancer, then large cell cancer, and then adenocarcinoma. And adenocarcinoma of the lung accounts for about 35 percent of lung cancers which we see.

Q So it's more than a third?
A Right.
Q Doctor, I forgot to ask you this, I know you don't keep a count or I don't expect you do, but how many cases of human beings with lung cancer have you looked at some part of the tissue, I'm not just talking about an autopsy, but investigated to look at whether or not it was lung cancer or not?
A Well, in my own consultation files, I have more than 4 or 500 cases that I've seen in consultation. And you add the cases that I saw when I was a resident and the cases that I've seen in our hospitals, I would say there's been over a thousand, maybe several thousand I've seen.
Q Of lung cancer?

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A Yes, sir.
Q Okay.
MR. MOTLEY: Your Honor, we move what's been denominated 513, which is the death summary. Mr. Ohlemeyer told me he didn't have any objection. Can I put it on the screen?
MR. OHLEMEYER: I have no

objection, Your Honor.
THE COURT: You're moving that into evidence?
MR. MOTLEY: Yes, Your Honor. We've got on a sticker, Judge.
THE COURT: Can I see it?
MR. MOTLEY: Yes.
THE COURT: Plaintiff's Exhibit 513 will be admitted.
(Plaintiffs' Exhibit(s) 513 received in evidence.)
Q Can you focus in on that cause of death? Does everybody see that? This is the death summary, sir, signed by Dr. Nicki Turner?
A Yes, sir.
Q A critical care specialist?
A Yes.
Q Cause of death, metastatic adenocarcinoma of the lung secondary to secondhand smoke.
First, what does metastatic adenocarcinoma of the lung mean as a medical term?
A That means adenocarcinoma which began in the lung and had spread to other sites in the body, that metastasized to a number of

locations in the body. And that's what that refers to.
Q Is it unusual for cancer of --
MR. MOTLEY: A little late in the day, Judge.
Q Is it unusual for adenocarcinoma that starts out in the lung to spread or metastasize to other organs?
A No. That's very common. It's very unusual to, at autopsy to see a patient with adenocarcinoma of the lung which has not spread or metastasized to some other body site.
Q Say that again.
A It's very unusual to see a primary adenocarcinoma of the lung at autopsy which has not spread to some other body site.
Q And you say very unusual. Are you talking about 51 percent of the time, 75 percent of the time, 90 percent of the time or what?
A I can't ever remember seeing such a case.
Q In your years you've never seen a case of adenocarcinoma that started in the lung that did not spread somewhere else?
A If the cancer was present at autopsy, that's

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correct.
Q Doctor, to a reasonable degree of medical certainty, do you agree that the adenocarcinoma of the lung of Ms. Wiley was secondary -- what does secondary mean in medicine?
A Secondary means what was the cause of it.
Q Do you agree that secondhand smoke caused her adenocarcinoma of the lung?
A Yes, sir.
Q Any question in your mind?
A I think more likely than not based on a reasonable medical certainty that was the cause.
Q Doctor, at my request --
MR. MOTLEY: Your Honor, this is 938.
THE COURT: Are you offering this?
MR. MOTLEY: Yes, Your Honor.
THE COURT: Any objection?
MR. OHLEMEYER: No objection, Your Honor.
THE COURT: 938 will be admitted.
(Plaintiffs' Exhibit(s) 938 received in evidence.)

Q This is the death certificate, Doctor. You've seen this too. It's Exhibit 938 filed here in Delaware County. Do you see the cause of death is adenocarcinoma of the right lung?
A Yes, sir, I do.
Q Do you agree with that?
A Yes, sir.
Q Doctor, would you identify this sheet of paper I'm about to hand you.
MR. OHLEMEYER: Excuse me.
MR. MOTLEY: I'm going to ask him to identify it and then give it to you.
Q Don't say anything about it. Just tell me what it is.
A This is a table that I have prepared showing the findings in the case of Ms. Wiley and comparing how common that is for lung cancer versus pancreatic cancer.
Q And you prepared that yourself?
A Yes, sir, I did.
Q Based on your medical knowledge?
A Yes, sir.
Q And if the Court allows us to show that, does that represent your scientific opinion

to a reasonable degree of scientific certainty?
A Yes.
MR. MOTLEY: And we're not offering it into evidence, Your Honor. We just want to use it as a demonstrative.
MR. OHLEMEYER: No objection to its use as a demonstrative, Your Honor.

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THE COURT: All right.
MR. MOTLEY: Could I mark this as chart 7? Is this the seventh one? I believe it is.
MR. OHLEMEYER: Can I get a copy of that?
MR. MOTLEY: Absolutely. I'll give you mine.
Q Can you come down, with the Court's permission?
THE COURT: Go ahead.
Q Now, first, again, for the record, this is chart No. 7. Why did you prepare this? How do you think this will assist the jury?
A Well, I think it will assist the jury in that my understanding of one of the issues in the case is what was the origin of the

cancer. And one of the issues that is brought up is that this cancer may have been originated from the pancreas instead of from the lung.
So based on my review of the pathology information, studies that were done, and the medical records, I made a comparison of whether the findings in Ms. Wiley's case were common in lung cancer or whether they were common in pancreatic cancer.
Q All right. And you have two columns, lung cancer and pancreatic cancer. Then you have a list of things -- these are what, sir?
MR. OHLEMEYER: I'm sorry to interrupt. Can we approach for a minute?
MR. MOTLEY: Sure. Take that off, please.
(Bench discussion)
THE COURT: Go ahead, Mr. Motley.
MR. MOTLEY: You can put it back up, please.
Q What -- obviously you say common, typical, rare, unusual. We'll get into that in a minute, but what are these things over here?
A These are findings that were present in

Ms. Wiley's case, either in the pathology materials, studies that were done, or in the medical records.
Q Okay. Let's go down one by one. And what you've done, for example, in this -- what is that, what does that mean?
A SX is doctor jibberish for symptoms.
Q Is there an "X" in symptoms?
A No, but neither is there an "X" in history, but "HX" is the abbreviation we choose for history, too.
Q Hemoptysis cough, what does that mean?
A Hemoptysis is coughing up blood, and any time a person coughs up blood, that is a symptom which is important to investigate and find out why that is happening, why that is occurring.

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Q And with respect to that symptom, I take it that symptom occurred while she was alive?
A Yes. These are both symptoms that came up within the final six months of Ms. Wiley's life.
Q You say in lung cancer that's common?
A Yes.
Q And in pancreatic cancer that's rare?

A Very uncommon, yes, sir.
Q The second finding is large mass in right lower lung, no mass in pancreas. What do you mean by a mass, a large mass?
A These are observations that were made by the autopsy pathologist with the naked eye looking at the organs at time of autopsy. And when that pathologist did the sampling, there was a large mass in the right lower lung, including one that would have replaced most of the right middle lobe and also involved part of the right lower lobe, and that there was no mass visible that the prosector or the autopsy performer saw in the pancreas.
Q So you're saying with his eyeball he saw a big tumor, is that it, a mass of tumor?
A Right.
Q In the right lower lung, but no mass was visible to the naked eye in the pancreas.
A Correct.
Q And then you say with a finding like that, that's typical of lung cancer and rare in pancreatic cancer?
A Right.

Q What do you base that on, sir?
A Experience and literature, what's present in the pathology textbooks.
Q By the way, have you contributed chapters to textbooks?
A Sure.
Q Have you even published a textbook?
A Yes, I have.
Q The third one says papillary and how do you pronounce that word?
A Acinar.
Q Acinar histology and histology means?
A The way the tumor looks under a microscope.
Q So now you're talking about not naked eye but a microscope?
A Yes.
Q And what is the significance of that? What does that mean?
A Well, papillary means that the tumor is making what we call finger-like projections under a microscope, and that the acinar means it's making gland or donut-like structures under a microscope. And this mixture of patterns is very common in lung cancer. We've actually written articles and

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studies that we've done about that.

Acinar histology is common for pancreatic cancer, but papillary is unusual for pancreatic cancer. There are some rare cancers called papillary cystadenocarcinoma of the pancreas that occur, very uncommon tumors, and those again show up as a mass in the pancreas that can have a papillary pattern, but that's very unusual.

So this combination of papillary and asiner appearance under a microscope is not something that you would typically see in a pancreatic cancer.

Q Now, did you not, sir, when you looked at the tissue, find cancer of the pancreas?

A Yes, sir.

Q You're not saying there wasn't cancer in the pancreas.

A No, sir.

Q Now, metastatic spread, what do you mean by that?

A This is the way this tumor had spread in the body. And first of all, what we saw is that there was a big mass in the right middle lobe. There was also a mass in the right

lower lobe that there are at least four different ways that lung cancer could spread from one lobe to another.

And there was also spread into the lymphatic channels in the lung, the tiny vessels that drain into the lymph nodes that we talked about earlier, there was cancer throughout those lymphatic channels. And there was cancer in the lymph nodes in the center of the chest and around the bronchi, which I showed you the diagram earlier where those lymph nodes are located. The typical pattern of spread for lung cancer is to the regional lymph nodes.

There was also spread to other lymph nodes in the body, one that was beside the pancreas, and that is where I believe that the tumor got into the pancreas, that it spread from that lymph node into the adjacent pancreas.

There was also a metastasis to the kidney seen microscopically, and then there were numerous metastases to the bones that were seen at time of autopsy. There was no metastasis present in the liver.

Q Have you ever seen an original pancreatic cancer that didn't spread to the liver?

A That can occur, but it's unusual for pancreatic cancer to have that pattern of spread. And also it's unusual in that when you have metastasis to the lung from pancreatic cancer, what you typically would expect to see would be nodules in both lungs

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that are about the same size and spherical, that's very important. The cancer, the way it metastasizes even as a smear, even when it becomes a very large metastasis, it's spherical. The radiologists call it a cannonball metastasis when it's a large metastasis; it's still spherical shaped.

The description at autopsy showed that the mass in the right middle lobe was much longer than it was wide or high, and so it did not have a spherical shape. So both the distribution in the lungs and the shape of the tumor in the right middle lobe would be very unusual for metastasis and make pancreatic cancer quite unlikely.

Q So it was not a cannonball tumor mass in the lung?

A Correct.

Q Anything else about that section?

A No.

Q Immunostaining. What does that mean?

A There were some stains that were done for the tumor, and this is probably the least helpful finding on the whole chart.

Dr. Cagle did some staining which showed that the tumor cells stained positive for cytokeratin 7, stained negative for cytokeratin 20, stained positive for a CA-19. That finding you could see in pancreatic cancer. You could also see it in lung cancer. I think that pattern favors a lung cancer over pancreatic cancer, but that's very soft and it's probably the least helpful thing on this whole chart.

Q All right. Immunostaining, you gave us a bunch of numbers and letters. Just generally, what does immunostaining mean?

A Immunostaining is when you use what we call antibodies that have been produced usually in a test tube that react with specific materials that a cancer makes. And it turns out that many adenocarcinomas make material

we call keratin. And, for example, keratin is the material that lines the skin and gives your skin an impermeable waterproof surface to it. And the keratin gets very thick on some areas like on your palms and on the soles of your feet. That's only one type of keratin, though, and it's been found that there are numerous types of keratins, at least 20 that have been identified.

And so people have found that the patterns of keratin expression differ from cells in one part of the body from another, and they can be of some help in determining where the cancer originated. But cancers don't always do what normal tissues do, so there are exceptions to the rules.

Q But on balance, all the stains point you

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more likely to lung cancer than pancreatic cancer?
A I think they favor slightly lung cancer over pancreatic cancer.
Q A P53 mutation; what does that say, G?
A G to 2 conversion in codon 157.
Q Okay. Doctor, what is P53 mutation?
A Well, I think we'll get into the details of

P53 later, but P53 is what's been called a tumor suppressor gene, and a tumor suppressor is a gene in your body which maintains the growth of cells in check so that they don't grow wildly, which is characteristic of a cancer. It's wildly growing cells. And it's been found that one of the things that goes wrong in many cancer cells is that you have a mutation so that the P53 is abnormal. It doesn't function anymore as a suppressor gene; it doesn't express growth. So by having this mutation in cancer cells, it allows the cancer cells to grow wildly.

Now, there are many different parts of a P53 gene. It's got many different -- we can call them spelling units that spell out the structure of the P53 gene. And if you have -- you can have mutations in multiple different points in the gene in the spelling errors, and we'll show that later in an animation. And it turns out that this particular spelling error where something is supposed to be a G for Guanine and it gets changed to a T for a thymidine, causes a

mutation in a very specific location of the gene. And this particular mutation has been highly associated with tobacco-induced lung cancer. It's not entirely specific. It has been described in some other cancers, but I'm not aware of it being reported in pancreatic cancer. And if it has been reported, it's a very unusual mutation in pancreatic cancer.

Q Did Ms. Wiley's cancer have this mutation you just described?

MR. OHLEMEYER: Objection, Your Honor, lack of foundation and hearsay to this witness.

MR. MOTLEY: I'll lay a foundation, Your Honor.

THE COURT: Sustained now. I'll sustain it at this point.

MR. MOTLEY: Do you want to return to your seat? You can take that off.

Q Dr. Roggli, did you suggest to the lawyers representing Mrs. Wiley that there be certain sophisticated DNA-type investigations undertaken of her lung tissue?

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A Yes, sir.
Q And did you suggest to the lawyers for Ms. Wiley where that be done?
A Yes, sir.
Q And where did you suggest that be done?
A I suggested it be sent to a pathologist that I'm quite familiar with at Baylor College of Medicine, a Dr. Philip Cagle, who is known nationally and internationally for the work he's done on the molecular biology of lung cancer, has presented his findings at many different pathology meetings that I've attended.
Q And, in fact, sir, did you receive a copy of a report that Dr. Cagle prepared upon his examination of DNA structure of this cell tissue, of the tissue on Ms. Wiley?
A Yes, sir, I did.
Q I'm going to hand this to you. Don't say anything about it. Just identify it.
Is this a copy of that report, sir?
A Yes, sir, it is.
Q Doctor, I want to hand you this, just say generally what this is. This is a medical article, I believe, or scientific article.

What's the name of the magazine?
A This is the journal called Science.
Q What is the journal called Science?
A It is the official journal of the American Association for the Advancement of Science, and it contains many scientific discoveries in many different areas of science including medicine that are published. It is, I think, the science equivalent of what we call the New England Journal of Medicine in medicine.
Q And is it a reliable source of information to scientists, in your opinion?
A Yes, sir.
Q Is that particular article authoritative and reliable according to your own professional opinion?
A I believe so, yes, sir.
Q What is the gist or substance of that particular article?
MR. OHLEMEYER: Objection, Your Honor. It's hearsay.
MR. FURR: Objection.
MR. MOTLEY: Your Honor, a scientific article establishing reliability

by an expert witness can be relied upon in formulating his opinion according to the Indiana Rules of Evidence. 803, 24, or 18 if memory serves me.
MR. OHLEMEYER: He can rely on things without describing them to the jury. If they are called to his attention on cross-examination, portions can be read to

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the jury as evidence; but at this point, Your Honor, it's hearsay.

THE COURT: He can rely on them in his testimony without telling us what it is.

MR. MOTLEY: Yes, Your Honor. The rule doesn't say it can only be brought out on cross-examination. The rule sales it can be used in direct, which is what I'm doing. And it also says, Your Honor, that he can rely on it in formulating his opinion, I respectfully suggest. The article itself doesn't go to the jury, but the opinion does. That's what I was attempting to do, inartfully apparently.

MR. OHLEMEYER: Same objection, Your Honor. It's been called to his attention on cross-examination.

MR. MOTLEY: The rule in Indiana doesn't say on cross examination to call to his attention. I'm not from Indiana, but that's what I've been told by Indiana lawyers.

MR. OHLEMEYER: To the extent called to the attention of an expert witness upon a cross-examination.

MR. MOTLEY: Or relied upon by the expert witness in direct examination. He forgot the next sentence.

MR. OHLEMEYER: That's the point. If he relies on it without quoting from it, I can cross-examine him on it over a hearsay objection. If I call it to his attention on cross and he or you or someone else establishes it is authoritative, it can be read to the jury, but it can't be given to him on direct examination for him to read to the jury.

MR. MOTLEY: I certainly don't agree that's what this rule just says in it's plain language, Your Honor.

THE COURT: Objection is overruled. Say your question again.

MR. MOTLEY: Frankly, I've forgotten. Could I ask her to help me out?

THE COURT: He identified the article and you asked him the gist of the article.

Can you answer as to the gist of the article?

THE WITNESS: Yes, Your Honor.

MR. MOTLEY: You better be able to answer the Judge's question.

A This article has to do with the P53 gene. And there are a number of studies that have shown that lung cancers, particularly those associated with cigarette smoking, frequently have mutations in the P53 gene. They have also shown that there are certain places in the P53 gene that are referred to

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as hot spots that are very commonly mutated in cancers in individuals who smoked cigarettes.

What these individuals did was to take a carcinogen, which is known to be present in cigarette smoke, they've taken a metabolite of it, that is, the carcinogen is converted to something else in the body to

make a material that's even more carcinogenic. They've put that metabolite in the test tube with cells from, human cells, and they have found that that metabolite of a carcinogen known to be present in cigarette smoke interacts with a P53 gene at exactly the same hot spots that have been found to be mutated in lung cancers from people who smokes cigarettes.

So the gist of the article is this is a mechanism by which one carcinogen known to be present in cigarette smoke can affect one gene that may be -- that is related and may be related to the progression and development of a cancer.

Q Now, back to Dr. Cagle. You suggested that the tissue be sent to Dr. Cagle for what kind of an examination, without telling us what he said?

A I suggested that it be sent for -- to determine if there was abnormal P53 present in the tissue.

Q And so without revealing what he said quite yet, why did you do that?

A Because P53 mutations, although not specific

for tobacco-induced lung cancers, are common in tobacco-induced lung cancers, so I thought it would be worthwhile knowing if such mutations were present in this particular cancer.

Q And is information like a P53 analysis by a reputable laboratory the type of information you normally use in your laboratory practice in reaching opinions and conclusions about medical issues?

A Can be, yes, sir.

Q Well, did you rely on it in this case?

A Yes, sir.

MR. MOTLEY: Okay. Under Rule 703 I ask that he be allowed to give an opinion based on the report, even if it's not admissible. I cite page 215 of Miller on Indiana Rules of Evidence.

MR. OHLEMEYER: Your Honor, I have no objection to the witness testifying that he used Dr. Cagle's report as a basis of his opinion.

THE COURT: I think that was the request.

MR. OHLEMEYER: But I don't think

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it's proper for him to tell us what Dr. Cagle's opinion is. We should hear that from Dr. Cagle so that we can cross-examine him.

MR. MOTLEY: That's not what the rule says, Your Honor.

THE COURT: Well, your request is that he can give his opinion based upon that report. That was the request.

MR. MOTLEY: Yes, sir.

THE COURT: Which we'll permit that.

BY MR. MOTLEY:

Q Dr. Roggli, based on that report and your own knowledge about P53 and the scientific evidence, did you reach an opinion, based on reasonable medical certainty, whether or not the type of mutation commonly found in cigarette-caused lung cancers was present in Ms. Wiley's tissue?

MR. OHLEMEYER: Your Honor, that's a different question. I object to it because it calls for the hearsay opinion of Dr. Cagle who is not here to give it to us.

THE COURT: I agree. Rephrase

that, Counselor.

Q Bottom line, Doctor. Based on all the information available to you, did Mrs. Wiley have a P53 mutation as commonly seen in cigarette-induced lung cancer?

MR. OHLEMEYER: That's the same question.

MR. MOTLEY: It is not, Your Honor.

THE COURT: You may answer that question. The objection is overruled.

A Yes.

Q Yes what?

A She did have P53 mutation.

MR. MOTLEY: Your Honor, I can't remember when you said you wanted to quit today so that I can go forward. It's almost 5:00. We are going into another area?

THE COURT: How much longer do you have with this witness?

MR. MOTLEY: Several hours.

THE COURT: We've had a pretty long day. We've actually accomplished a lot today. We will take the evening break at this point, ladies and gentlemen.

Remember my admonition. First of all,

leave your notes in the jury room. If there are any exhibits, and I don't think there are, make sure we get them. We will start tomorrow morning again at 88:30 in the morning. Please do not read anything that might be in the newspaper about the case, don't listen to anything on television or see anything on television about the case.

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Don't talk to anyone about the facts of the case or what happens in court. And don't talk among yourselves. Above all keep an open mind, don't form or express any opinions. If anybody does try to call you, don't talk to them and tell us about it. See you tomorrow morning at 8:30.

MR. CASSELL: All rise.

MR. MOTLEY: Judge, I know that you asked this question the other day, but now that you've possibly seen how much we're going to be using this, would you like for us to have a monitor on your desk, particularly if these doctors are going to be down here blocking your view?

THE COURT: I would appreciate that. I tell you, I thought I could see

that all right but I was wrong.

MR. MOTLEY: The witness was standing in the way.

THE COURT: My eyes aren't that good.

MR. OHLEMEYER: Couple things, Your Honor.

THE COURT: We're still on the record. Jury is not now present.

MR. OHLEMEYER: We've got a couple of depositions that the plaintiffs indicated they might want to play tomorrow, the videotapes. One of them I have no objection to, so long as they will play the counter-designations that we filed.

MR. MOTLEY: Who is that?

MR. OHLEMEYER: Dr. Spears.

MR. MOTLEY: Did we clarify whether we gave him the right Spears deposition or not?

MR. PATRICK: I don't know the answer to that.

MR. MOTLEY: Which one did we give you?

MR. OHLEMEYER: You gave us one

which is not really the right one.

MR. MOTLEY: There are two. It's the one Mr. Westbrook took. But I don't mind if you show the cross obviously of -- which one do you want? Tell me what you want to show.

MR. OHLEMEYER: Let me start. They gave me some deposition designations. One of them is a Dr. Spears who is not on -- who is on their list. Remember they filed all those page and line designations. The one they told me they wanted to play tomorrow apparently is not on those page and line designations.

MR. MOTLEY: We won't show them.

MR. OHLEMEYER: I understand that. Now they're going to tell me they want to

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show another one. That's fine; we'll deal with that.

The other one is Dr. Osdene, is not on the page and line designations that were filed. I have an objection to that on a number of different grounds, including the fact that I think one of your pretrial orders deals with criminal investigations.

This is a deposition where Mr. Motley asked this witness 100 questions, 100 answers he got were on advice of counsel I'm invoking my Fifth Amendment right to protect himself from incrimination. I think that is something that is not probative of any issue in this case, the fact that a witness on advice of counsel decided that he was going to invoke a constitutional right not to answer Mr. Motley's questions. That is highly prejudicial under Rule 403. I think you could exclude it for that reason, and quite frankly, it's not on any of the deposition designations provided prior to trial.

MR. MOTLEY: That's a clerical screw-up. He obviously knows about it. We'll correct that.

MR. OHLEMEYER: Let me interrupt. It's not a clerical screw-up. We spent a lot of time in this case exchanging things that Your Honor ordered us to exchange. I don't view that as a clerical screw-up.

MR. MOTLEY: I don't know which Osdene they designated.

THE COURT: So there's an objection because it was not listed. And his name again?

MR. MOTLEY: We listed it your Honor. O-S-D-E-N-E. He's a former chief scientist for Philip Morris. Number one, We did list Osdene. What happened was unfortunately in communicating this, there are three Osdene depositions that I know about. There was one taken in the Chipalow (phonetic) case that went to the U.S. Supreme Court back in the '80s where he did not take the Fifth. There is one taken in the State of Texas case, a Medicaid case that I took. There is one taken in the State of Minnesota case which those lawyers took.

It is the State of Texas case where I asked the questions, that was supposed to be designated. If it wasn't, it was listed as a deposition, but on the 48-hour rule, whoever gave him the designation gave him the wrong doggone one. So that's our fault; no question about it.

I would like to address the substantive

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issue, the Fifth Amendment. We filed a brief in the State of Texas. One was filed in the State of Minnesota. I understand Your Honor is not bound by any of that, but I think the reasoning of those Courts why they let those depositions be shown to the jury, in ruling, in writing, should -- we ought to be able to let Your Honor think about that and the reasons they cited. And we have a brief on which I will file tomorrow which means I won't try to show that deposition tomorrow at all.

We designate it right here. I don't know what he's talking about. It says State of Texas.

MR. OHLEMEYER: Your Honor, if I may hand you the pleading that they filed, the pleading that was filed pursuant to the Court order on the 23rd of January does not contain designations from that deposition.

MR. MOTLEY: Why did they move to exclude it if they didn't know that was what we were talking about?

MR. OHLEMEYER: We didn't move to exclude any evidence about ongoing criminal

investigation.

THE COURT: What other deposition are you objecting to?

MR. OHLEMEYER: I think we're going to work this one out.

MR. MOTLEY: Spears. We'll work the Spears out. We won't show either one tomorrow.

THE COURT: Do you have a brief on the Fifth Amendment issue?

MR. MOTLEY: Yes, I do. I don't know if I have it in my back pocket. I can get it to you first thing at 8:00 in the morning.

THE COURT: I'll have some time in the morning to review it.

MR. MOTLEY: Should I bring it over to the clerk in the morning, to the bailiff in the morning?

THE COURT: In the morning.

MR. OHLEMEYER: One other matter, Your Honor. Mr. Motley surprised me when he said he had several more hours with Dr. Roggli.

THE COURT: Did I hear that

correctly?

MR. MOTLEY: Yes, sir.

THE COURT: On direct?

MR. OHLEMEYER: Could I inquire as to the subject matter of that testimony, because if it's giving Dr. Roggli's 26(b)(4) response, that's surprising me that there could be several more hours for things for

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him to talk about.
MR. MOTLEY: I didn't say seven.
MR. OHLEMEYER: Several.
MR. MOTLEY: Can I have the 26(b)(4). He was deposed for how long in this case, Charles?
MR. PATRICK: Seven hours.
MR. MOTLEY: Seven hours of deposition in this case.
MR. OHLEMEYER: Which you're paid for by the hour.
THE COURT: Where else are you going? Just generally where else are you going?
MR. MOTLEY: I want to go into the diseases in addition to lung cancer that cigarette smoke can cause on the issue of

the dangers. It doesn't have to be the same disease that caused this problem. We want to go into what he knows about the biological plausibility that environmental tobacco smoke caused this disease in human beings. We want to go into the numerous toxic substances that cigarette smoke contains, and we want to go into the issue of he personally received from the tobacco companies a study in 1984. He's got his copy here with him with the courtesy of the Council for Tobacco Research, a defendant in this case, with a misleading, totally false statement in it about whether or not cigarette smoke causes adenocarcinoma of the lung, and he's an eyewitness to that.
He's been deposed on that issue for at least 20 hours by these same defendants, including Mr. Ohlemeyer's partners on this very issue, Your Honor. It goes to the fact that he's an eyewitness to this. He doesn't even have to be an expert witness to this but he's an eyewitness to this. Charles, I don't know --
THE COURT: I just asked you where

you were going with this.
MR. MOTLEY: That's where I'm going.
MR. OHLEMEYER: That's why I asked because, of course, as you might suspect in that last point isn't anywhere in the 26(b)(4) interrogatory response.
So I have no objection to Dr. Roggli telling us about the biological or the medical issues that may or may not relate to Mrs. Wiley or cancer in general, but at the point where he starts telling us about what cigarette companies did and what his conduct was, he's beyond his disclosure and beyond what's fair that's been identified as the subject matter of his testimony.
THE COURT: Well, I will deal with

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that if it happens.
MR. OHLEMEYER: Thank you.
MR. CROSS: One other matter. We have -- we've stipulated -- plaintiffs want to move into admission several documents as exhibits and the defense has indicated they have no objection, and I would just like to make that record.

THE COURT: These are to be admitted?
MR. OHLEMEYER: Why don't you just make a chart, a summary.
THE COURT: Is there some reason I want to admit these out of the presence of the jury?
MR. CROSS: We'll do it tomorrow.
THE COURT: I would rather do it in the presence of the jury.
MR. BYRON: On behalf of Council for Tobacco Research we want to be heard too with Mr. Ohlemeyer tomorrow on that because it's clearly outside of the disclosure statement.
THE COURT: I will, Mr. Byron. I will. Thank you. All right. 8:30 in the morning.
(The proceedings were adjourned at 5:00 p.m., to be reconvened on February 12, 1998, at 8:30 a.m.)

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